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Dugald Bannatyne Esqr.
With the Authors'
kind regards. –

INQUIRIES

ELEMENTARY AND HISTORICAL

IN THE

SCIENCE OF LAW.

BY

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PREFACE.

SOME apology may, perhaps, seem requisite, for a practical lawyer allotting any portion of his time to studies so much apart from the routine and technicalities of ordinary business, as those, which form the subject of the following inquiries.

The author's original design was the composition of practical treatises on the principles of maritime and commercial law, national and international. But from his having devoted himself to the discharge of the duties of a provincial semi-judicial office, and from his consequent want of leisure, he was, in the former of those projects, fortunately for the public, anticipated by his friend, the present learned Professor of the Law of Scotland in the University of Edinburgh, enlarging his excellent treatise on Bankruptcy, into his still more valuable commentaries on the principles of Mercantile Jurisprudence.

Although, however, the practical treatise, on the Maritime and Commercial law of this country, which

he had contemplated, was, for the reason just alluded to, abandoned, the study of the general doctrines of law was continued by the author, at such intervals of leisure, frequently distant, as the multifarious duties of his official situation permitted; partly that he might keep himself up to the progress of juridical science, partly as a relief and relaxation from the labour, and tedium, of official and professional business. And these notes, as recently revised, are now submitted to that portion of the public, who take an interest in such matters; not, certainly, as containing, in refutation of the sarcastic remark of a French philosopher of the last century, "*Une découverte en morale,*" not as exhibiting any extension of the boundaries of legal science, not as making pretensions to novelty or originality of thought, but simply, as calculated to induce the youth of the nation, destined to the study of the law, to take enlarged, and elevated, views of the important science, and art, to the cultivation, and practice, of which, they have devoted their talents and industry, and to lead and enable them to form for themselves, less vague, and more distinct and precise notions, and more just and correct opinions, than are frequently entertained, on such subjects, even in this comparatively enlightened age.

As the following observations were thrown together, at different periods, and frequently at distant intervals, and as, on these separate occasions, one particular object was generally in view, and one train of thought was prevalent, the notes have assumed the shape of

detached inquiries; and while the latter circumstance may be convenient, with a view to separate subsequent publication, it certainly has led to frequent repetitions of the same doctrines. But these, it is trusted, will be excused; as, upon revisal, it did not appear, the passages constituting such repetitions, could be struck out, without rendering the meaning, of what remained, obscure. And although they may each form a separate, or detached whole, the inquiries will perhaps be found, upon comparison, to form connected parts of one greater whole.

Glasgow, *March*, 1840.

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CHAPTER I.

OF THE SCIENCE OF LAW GENERALLY, AND OF THE DIFFERENT SIGNIFICATIONS OF THE TERM LAW.

THE Science of Law, in the strict sense of that term, having for its object the compulsory regulation of the external actions of men in the material world, in relation to each other, especially when congregated in communities, obviously does not admit of the consistency and certainty of mathematical truth, and is not what the French call *une science exacte*, or what the Germans designate as knowledge *a priori*, general, necessary, existing in pure reason. It is occupied with the human constitution, corporeal and mental—with the circumstances in which men are placed on the surface of this earth—with the powers, with which they are invested, and the restraints or limitations, to which they are subjected, in reference to each other—and with their actions, all as matters of fact. It, therefore, belongs to that by far the largest and most important part of the domain of human knowledge, which the Germans deno-

minate empirical, or *a posteriori*, which embraces all physical existence and event, which is so far dependent on, or affected by, time and place, and which can only be acquired by observation and experience.

But although law may not be one of the exact sciences, although it cannot compete, in point of certainty, with the sciences of extension and number, it ranks, in point of evidence, with all the physical sciences, of which fact, existence, or event, material or mental, are the object, and particularly with the physical sciences of matter, organized or unorganized, whether mechanical, chemical, or medical. And it appears to be now generally admitted, that the inductive mode of philosophizing, if not originally introduced, at least so powerfully recommended by Lord Bacon, and so successfully cultivated by Sir Isaac Newton, is equally applicable to the phenomena of mind as to the phenomena of matter; and that, although, from various obvious causes, it may be attended with much greater difficulty and uncertainty in its application to the former, than to the latter, it is the only method by which we can hope to make any real or solid advances in the mental, as well as in the material sciences, —in the investigation of the sentient, intellectual, and social nature of man, as well as in the various branches of mechanical and chemical philosophy.

It appears, also, to be now generally acknowledged, that, in all these sciences, systems founded not upon the patient and discriminating observation of the actual phenomena of nature, upon accurate analysis, and upon strict induction from particular facts, and correct generalization, but upon hypothesis, upon vague, partial, or conjectural views, upon the gratuitous assumption of principles, often in a great measure imaginary, from which the phenomena may be inferred to exist or arise, and upon excessive generalization from an extreme love of simplicity, however much they may indicate the

ingenuity and talents of their authors, are calculated only to amuse, not to instruct; and while they mislead the judgment, are frequently productive of practical consequences, injurious to society.

So intimately connected, too, and in a manner so identified is thought, with language, its representative, that in the sciences conversant with matter, and still more in the sciences of which mind is the object, it is of the utmost importance, to avoid the use of indefinite and ambiguous expressions, or of the same expressions in different senses; to endeavour to analyze such vague and general, or complex terms, as we find already existing in our language, and may therefore be obliged to employ, into their simple elements; and thus to form for ourselves, and to convey to others, such distinct and precise, notions as may tend to preclude all mere disputes about words, and remove, as far as practicable, any ground for diversity of opinion, beyond what may arise in the course of the observation of the actual phenomena.

By adopting these preliminary remarks, as guides, we may perhaps be enabled to take more definite and accurate views, than have frequently been entertained in the science of law.

As the proper subject of the following elementary inquiries, the term "law" is, of course, intended to be used in that comparatively limited acceptation, in which it forms the study of the judge and practical lawyer, of the jurist, the legislator, and the statesman. But it may be of advantage to commence with an attempt to ascertain, by a sort of grammatical analysis, the various senses, in which the term law has been employed; as we may in this way perceive more distinctly the place which law, strictly so called, holds among, and in relation to, the other departments of human knowledge; and in particular mark the boundaries between law, in

its limited and proper signification, and the kindred science of ethics.

Different Significations of the term Law.

In our grammatical analysis of the term law, we shall begin with the most general sense; and then consider in succession, the less and less general senses, embracing those modifications and limitations, which, narrowing the signification, bring it ultimately under the cognizance, and within the sphere of the lawyer.

Physical Law.

In the most extensive philosophical or scientific, but obviously metaphorical, acceptation, in which it has come to be used in our language, the term law appears to imply simply, and to be synonymous with, the relation of cause and effect, or the power, by which similar changes or events invariably take place in similar circumstances; and to indicate or denote the uniform and permanent or invariable mode, in which different objects, or substances, whether in the material or mental world, act or operate upon, or affect, or influence, each other, as the necessary result of their nature or constitution. In this sense, law seems to embrace, or to be applicable to, all the different departments of philosophy or science, in which we contemplate the various changes or events, that take place in the worlds of matter or of mind, and, employing the inductive mode of reasoning, rise from particular to general facts, arrange phenomena according to the laws observed by them, and theorize in the correct and proper sense of that term. Thus we talk of the laws, by which the earth and the other planets perform their revolutions around the sun, and by which the motions generally of the celestial bodies are regulated, as con-

stituting the science of astronomy. Thus, also, we talk of the laws, by which inorganic material bodies act upon each other, and which, according as these bodies, thus produce, or do not produce, permanent changes in their internal constitution, form the multifarious objects, either of the chemical, or of the mechanical, arts and sciences. Thus, too, we talk of the laws of the organic world, of the economy of vegetation, and of the laws of animal life, as the foundation of the art of medicine.

Nor is the term law, in this general philosophical sense, less applicable to the phenomena of mind, than to the phenomena of matter. As a sentient, intelligent, social, and moral being, placed on the surface of this earth in common with his fellows, man is as much subject to certain physical, whether material or mental, laws, as the universe around him. In his corporeal frame, we trace the laws by which he has communication with the external world, by which animal life is preserved, and the species propagated and continued. In his intellectual constitution, we trace the laws, by which the processes of human thought are unfolded and regulated, by which the various sciences and arts are in a manner created, and advanced. In his moral nature, in his relation to his Creator, or his fellow-men, or other sentient beings, we mark the laws, by which he is formed to distinguish right from wrong in human action, to feel the obligation to pursue a virtuous course of conduct, and thereby to attain the destiny, for which he appears to have been created. In his social dispositions, and in the consequent associations of individuals into different communities and nations, we observe the laws, by which such aggregate bodies are formed, by which they make their internal arrangements, by which they prosper and advance, or become stationary or decline, by which civilization is promoted, and the species improved. And although these physical laws may not

form a direct or immediate object of study to the practical lawyer or legislator, we shall afterwards have occasion to observe, that, as in the material world they constitute the ground-work, upon which all improvements in mechanical, chemical, and medical art, are founded, so, in the mental world, they in reality form the basis of all human legislation; the operation of the latter being merely auxiliary and supplementary.

In ordinary scientific language, the term "moral" has usually been employed to denote the sciences of mind, as opposed to the sciences of matter. But it is plain, there is a physical science of mind, as well as a physical science of matter, embracing those laws by which mind has been formed to act, has acted, acts, and will act, separate and distinct from the sphere of voluntary action assigned to man. And, in point of perspicuity, there seems to be an advantage, in confining the use of the term "moral" to the voluntary actions of men, to what ought, or ought not, to be in human conduct, to those laws which, as a matter of possibility, men may observe, or may transgress; the latter event not being physically excluded, but having, like the former, certain consequences immediately or remotely attached to it.

The practice, however, is so inveterate, of confining the term "physical" to the sciences of matter, that there is now little prospect of the introduction of the more generic and appropriate use of that term before alluded to. And as the term "metaphysics" has been used in such a variety of senses, and has so little definite or distinct meaning from its origin, or in itself, it seems the better fashion to discard it altogether; and to denote the knowledge of the laws of mind, which have an existence, as real as the laws of matter, (the subject of what are usually called the physical sciences,) and which are equally independent as the laws of matter, of the human will, by the term mental sciences; as contra-distin-

guished from the moral sciences, or knowledge of the laws, according to which human voluntary actions are felt and considered to be susceptible of moral approbation or disapprobation, with reference to the merit or demerit of the agent, or with reference to the consequences of the action, as generally hurtful or beneficial to mankind.

Moral Law.

Next to the very general metaphorical sense of the term law, which we have just noticed, and which, it will be observed, is applicable solely to the physical sciences, whether of matter or of mind, comes another general philosophical acceptation of the term, more limited than the former, but still very extensive; which is confined to, but embraces the voluntary actions of rational and moral beings, and particularly the whole range of human voluntary action; which regulates and determines, not what physically is, or shall be, but what ought to be; and forms the object of the moral, as distinct from the physical sciences. In this extensive sense, we talk of the moral law as comprehending the relations of the Creator and creature, as well as of man to his fellow-men, in their reciprocal conduct; as defining the cardinal virtues of piety, of temperance and fortitude, of justice and beneficence; as explaining all the duties of mankind in the various relations of domestic life, of civil and political society. In this sense, law includes all the doctrines of, and is synonymous with, the science of ethics.

In this extensive acceptation, law is not the peculiar subject of the present inquiries. But it may be of advantage, to examine a little more minutely, the meaning of the term moral law, with a view to our future investigation of the boundaries or limits between it, and

law in the more restricted sense, in which we are afterwards to consider it. And without here stopping to discuss the various theories of morals promulgated by philosophers, it will be sufficient to remark the two leading qualities or attributes, common to a large portion of human voluntary actions, apart from their conformity or disconformity to the will of the Deity, which we shall have occasion to consider under another acceptation of the term law :—

First, Such actions may be viewed in their origin, with reference to the feelings or motives from which they spring, and their tendency to excite in the mind of the individual agent, or of other individuals, or of mankind generally, certain sentiments, feelings, or emotions of approbation or disapprobation, of love or hatred, of esteem or contempt, in relation to the agent.

Secondly, Such actions may be viewed with reference to their consequences, their tendency to promote or diminish the happiness of the individual agent, or of other individuals generally, or of the society, limited or extensive, of which the agent is a member.

That such sentiments and emotions of moral approbation and disapprobation are excited by the contemplation of the voluntary actions of human beings, is a fact established by the consciousness and observation of every individual, by the experience and testimony of all nations and ages. Such feelings are not confined to any region of the earth, to any mode of life, to any stage of civilization. The existence of such sentiments, too, is clearly evinced by the existence of terms employed to denote them, in the languages of all the nations, of which we have any accurate knowledge; such as, right and wrong—virtue and vice—merit and demerit—ought, as implying not what a human being must do from physical compulsion, but what is morally becoming for him to do—duty and obligation, as opposed to

inclination, inducement, and interest. It is, no doubt, possible to conceive, that in the vast range of created existence, there may be found rational beings totally devoid of these feelings, never glowing with the admiration of virtue, nor roused to indignation at vice. If, however, such beings exist, they unquestionably are not men. The Omniscient Creator may at a glance foresee all the possible modes of action, and all the consequences of such actions, in their most remote ramifications; but the general good of created being, or even of the human race, is too vast an object to be distinctly comprehended and accurately ascertained by the very limited capacity of man, and cannot with safety be resorted to by the individual, as a practical rule of conduct in all the multifarious, complicated, and rapidly succeeding occurrences of human life. From the very imperfect nature, too, of the human faculties, the opportunity of acting might often be lost for ever, before the calculation of good or bad consequences could be completed. The Author of his nature, therefore, has not left man to be directed solely by the directions of reasoning, which might not only come too late, but of which the influence might be too feeble. As in many other cases, the weakness of reason appears here to be supplied by intuitive sentiment, or instantaneous feeling and impulse, by an immediate perception of the obligation of adhering to certain lines of conduct, without being under the necessity of making the circuit of experience. In short, the result of observation and experience is, that it is impossible to deny the existence of those immediate or intuitive judgments, sentiments, and feelings, of moral approbation and disapprobation, which, from its physical constitution irresistibly arise in the human mind on the contemplation of the different descriptions of voluntary actions, independently of, or at least without any immediate regard being had to, their

consequences; whether these distinctions be perceived, like truth by the understanding, or whether these feelings and sentiments be the direct operation of a separate moral faculty, or practical reason, coeval with the birth of the individual, or the result of association, the derivative and compound effect of the union, or united operation of other more simple faculties.

But while it thus appears, that the excitement in the human mind of moral sentiment by the contemplation of human actions, with reference to the views, feelings, and motives, in which they originate, is a radical and fundamental part of our nature, it is equally clear, that these actions may be viewed, not with reference to the motives from which they spring, but with reference directly and solely to their consequences or effects, as useful or hurtful to the individual agent, or to the individuals, with whom he may be more nearly or more remotely connected,—as individually or generally expedient, or the reverse. Indeed, in one vast department of human affairs, the principle of general expediency is the chief, and almost the only moral criterion, to which recourse can be had. In the complex details of political arrangement, in the intercourse of nations, the moral feeling which serves as a rule of conduct to the individual, although not silent, speaks with a comparatively feeble voice. We are led by a sort of moral impulse to perform the various duties of private life; but this guide in a great measure deserts us, when we investigate the legislative, executive, judicial, and economical establishments of civil society, or the reciprocal transactions of independent states. To the individual it may be a sufficient reason for determining him to perform, or abstain from, a particular action, that he follows the dictates of his conscience, that he feels a disposition to approve or to disapprove of it in a moral view, without any direct reference to its consequences.

But this moral sentiment or opinion he cannot set up as a rule or standard for other individuals, unless he can appeal, either to a similar corresponding sentiment, uniformly excited by the contemplation of such an action in the minds of other individuals, or of mankind generally (such as we have just found to have a real existence), or to the external consequences of such an action, as beneficial or hurtful to the agent himself, or to other individuals, or as calculated to increase or diminish the general happiness of mankind. And although it may be impossible for us, to assign any other foundation to the principle of general utility, as regulating our conduct, or to give any other reason for approving or disapproving of actions, as being advantageous or detrimental to mankind generally, than the moral perception that it is right to do so, or the moral feeling of the duties of justice and beneficence, there can be no doubt that there thus exist, not merely an internal, but an external, criterion of the morality of human actions, which, considered as events or facts that have occurred, are occurring, and will occur, and be productive of certain consequences, admit of ascertainment by observation and experience, of classification, and of inductive reasoning, like other physical phenomena.

As the basis of the moral law, then, independently of, or apart from, the will of the deity, there appear to be two separate, and distinct, and independent, standards or principles; that of moral sentiment, recognising the distinctions of right and wrong, of virtue and vice, in human conduct; and that of general expediency or utility in human actions. And from their being separate and independent, most philosophers, particularly in modern times, appear to have rather hastily and rashly concluded, that these principles are opposed to each other, inconsistent, and incompatible. At least in almost all the different theories of morals, which have been prc-

pounded, the ingenious authors of these theories have almost uniformly adopted one of these principles to the exclusion of the other, attempting to explain all the phenomena in question, by their own favourite principle, and totally disregarding the other.

Thus, in modern times, the philosophers, who found morality on the sentiments of approbation or disapprobation excited in the mind of man by the contemplation of human actions, without any immediate reference to their consequences, whether they ascribe these sentiments to the intellectual faculties, or practical reason, such as Cudworth, Clarke, and Kant; or to conscience, or a separate moral faculty, such as Cumberland, Hutcheson, Shaftesbury, Reid, and Dugald Stewart, appear to hold, that the general utility of actions cannot, in any point of view, be admitted as a criterion of their morality, because the simultaneous or immediate perception of that utility does not form an essential element, or even a palpable constituent part of our moral sentiments. And in this way, these theories have perhaps been exposed to attacks, which might have been avoided, and have not been based on so broad and firm a foundation, as experience and sound philosophy warranted.

On the other hand, those modern philosophers, who found their theories of morals on the principle of utility, such as Hume, Paley, and Bentham, either overlook, or exclude, moral sentiment altogether, or undertake to derive all our moral feelings from considerations of expediency, either private, or public, and general. Indeed, this theory of morality, as founded solely on utility, or the greatest happiness principle, as it is now frequently called, is not confined to modern times, and still less can it with truth be ascribed, as is sometimes erroneously done, to Mr Bentham as its original author. In proof of this, it would be superfluous here to quote the works of Plato, of Aristotle, or of Cicero; it is suffi-

cient to refer to the doctrine of Epicurus, as versified by the Roman poet:—

> " Nec natura potest justo secernere iniquum."
> " Atque ipsa utilitas justi prope mater et æqui."
> HORAT. SERM. I. 3. L. 113 and 98.

But this theory, too, remains imperfect in modern, as it was in ancient times; in as much as it excludes those moral feelings of mankind, of which the existence cannot be denied, and attempts to account for them by such vain and fallacious reasonings, as would lead to the conclusion, that there is no difference between the feelings of interest and duty, or that the greater intensity of an inducement will create, or convert it into, a moral obligation; as if the sanction of the principle of utility itself, did not presuppose the existence, and were not derived from the anterior moral principle, that it is right, that it is the duty of man, to promote the happiness of his species. And it is rather to be regretted, that Mr Bentham, to whom the science of law, strictly and properly so called, is so much indebted, should have rather injured the cause, or lowered the dignity of the moral law or ethics, by expounding, as the sole basis of the latter science, those principles, which we shall afterward see, are, if not solely, at least chiefly and peculiarly, applicable to the former science. It is also to be regretted, that the adoption of the theory of utility, by resolving moral obligation into the prospect of obtaining everlasting happiness after death, should have led such an eminent teacher of practical morality in detail, as Dr Paley, to weaken and degrade, if not to exclude, those more elevated views and nobler feelings of our nature,—that conscious integrity, which finds in itself its motives and reward,—that ardent love, and disinterested practice of virtue, for its own sake, which constitute, in this life, all the moral majesty of man.

But there is happily no necessity for adopting either of these theories of morals, to the exclusion of the other. As usual, the truth seems to lie between the two extremes. The theories of the two sects of philosophers, of the supporters of the principle of moral sentiment, as well as of the patrons of the principle of utility, are both so far well founded; because, to a certain extent, the principles of both sects have an actual existence in nature. Each of the theories is so far erroneous, because, from the extreme desire of generalization and simplification, each of the principles has been pushed to a greater length, than nature or fact warrants. But the two principles, although separate and independent, are by no means opposed to, or inconsistent, or incompatible with each other. And it is at least unphilosophical, from an excessive love of simplicity and system, the great failing of speculative minds, to attempt to separate in theory, what nature herself has combined,—what co-exists in fact. While, therefore, with an Epicurus, a Hume, or a Bentham, we calculate the number and amount, and measure the extent of the diffusion, and the degree of intensity of human pleasures and pains, we may, at the same time, without inconsistency, sympathize with a Plato, a Marcus Aurelius, or a Seneca, with a Fenelon, a Shaftesbury, a Smith, or a Brown, in the ardent love and admiration of that incorruptible integrity, that disinterested and generous beneficence, that devoted and enlightened patriotism, which are maintained and pursued, solely as the right and becoming exercise by man, of the powers delegated to him by his all-perfect Creator.

To this conclusion, the author of these inquiries was led many years ago. And he was gratified to find his view anticipated and confirmed by the authority of Sir James Macintosh, in his recent *Dissertation on the*

*Progress of Ethical Philosophy.** In the passage referred to, that highly accomplished jurist has the merit, it is believed original, not merely of pointing out the errors of former philosophers, in confounding the two principles, and in holding, and representing them to be opposed to, and inconsistent with each other, but also of demonstrating the fallacy in their reasoning, by the following simple, but profound remark:—

"That we are endowed with a moral sense, or, in other words, a faculty, which immediately approves what is right, and condemns what is wrong, is only a statement of the feelings, with which we contemplate actions. But to affirm that right actions are those which conduce to the well-being of mankind, is a proposition, concerning the outward effects, by which right actions themselves may be recognised. As these affirmations relate to different subjects, they cannot be opposed to each other, any more than the solidity of earth is inconsistent with the fluidity of water; and a very little reflection will show it to be easily conceivable, that they may be both true."

The co-existence and compatibility of the distinct and independent principles of moral sentiment, and of general expediency being thus established, it may only be farther observed, that the coincidence of these principles in their practical result to mankind, taken either individually or collectively, has been happily illustrated by different ancient and modern philosophers. Thus, while he recognised the separate and independent existence of moral distinctions, the chancellor D'Aguesseau, about the middle of the last century, in his *Meditations Philosophiques sur l' Origine de la Justice,* traced and deduced by an elaborate chain of reasoning, all the duties of man towards his Creator, himself, and his fel-

* Sect. i. p. 298.

low-men, as, although not emanating from, yet consistent with, and sanctioned by, a rational and enlightened self-love, or desire of real and true felicity. And nearly two thousand years ago, Cicero, adopting the exalted views of the stoical philosophers on the subject of the *summum bonum*, inculcated the following doctrine in his excellent moral instructions to his son. "Nihil vero utile, quod non idem honestum; nihil honestum, quod non idem utile sit, sæpe testatur: negatque ullam pestem majorem in vitam hominum invasisse, quam eorum opinionem, qui ista distraxerint." *De Officiis Lib.* iii. *c.* 7.

Law, as the Command of Superior Power.

We proceed with our analysis of the different senses of the term law. And neither the most general scientific signification of the term, as applicable to the physical sciences of matter and mind, nor its more limited, but still very general signification, as applicable to moral science, appear to have been its original or primitive meaning. Its more early, and ordinary, or common acceptation, seems to convey the idea of superior power, commanding or prohibiting the performance of certain actions, and enforcing its orders, by means more or less effectual, immediate, or remote. Under this aspect, we may distinguish other two senses of the term law, different from those we have hitherto considered, and different from each other, according as the power involved in the idea is exercised by the Creator over his creatures, or by the creatures over each other, under the liberty of voluntary action delegated to them. And in this sense law is either divine or human.

The Divine Law.

We thus arrive at a third signification of the term law, when we speak of the Divine law, as being the will and power of the Creator exercised over his creatures. And here it is manifest, the law prescribed may either be unfolded and inferred, through the medium and intervention of the Creator's works, or may be directly and immediately revealed; the one constituting the Divine law, as discovered by the light of nature; and the other, the positive, or express Divine law, or revealed religion.

Natural Religion.

From the contemplation of the physical laws of the material and mental worlds, in the general metaphorical sense of the term, in which we first considered it, men, in all countries and ages, have, by the construction of their minds, been irresistibly led to the inference, conclusion, and belief, of one great omnipotent and all-wise First Cause, as the source and support of all created beings, and as the author and founder of all those laws, by which the unceasing changes and events in created existence take place, and are regulated. And although the mode, in which the great First Cause has acted, or acts, in the creation of material or mental beings, or in the production of the various successive changes, or modifications, to which they are subjected, appears, notwithstanding the ingenious and bold speculations of many philosophers, to be placed beyond the discovery of the limited faculties bestowed on man in this mortal state, the primitive idea of command is so far involved, even in the physically scientific sense of the term, when we consider the laws of the celestial bodies, and of the terrestrial world in general, as prescribed and imposed by their all-wise and omnipotent Creator.

In the contemplation also of the laws of the moral world, properly so called, the human mind extending its views from the dispositions and characters of men, as exhibited in their actions, to the attributes of the great First Cause, as displayed in the creation and preservation of the universe, is irresistibly led to ascribe to the Supreme Being, not only omniscience, omnipotence, and infinite wisdom, but likewise infinite goodness and beneficence; and he discovers in the will of the all-perfect Creator, a law for the conduct of all his creatures. Nay, rising still higher, beyond the limits of the life assigned to man on this earth, the human mind is enabled by its native strength, from the continued contemplation of the physical laws of matter and of mind, and of the moral law as exhibited in the actions of men, and in the dispensations of Providence, to infer with a confidence, not to be resisted, the immortality of the human soul, the existence of a future state, and a law prescribed by a Being of infinitely greater power, and enforced by the sanction of future happiness or misery.

In the general view, we have just taken, all the laws by which either the material or mental worlds are regulated, may be held ultimately to have their origin and foundation in the all-perfect Creator. Of all the laws, whether of the material or mental worlds, which form the object of the physical sciences, the Deity is obviously the author. The positive laws, too, which mankind establish when united in civil society, are obviously the exercise, whether for good or for evil, of the limited powers, which the omnipotent Creator has thought fit to delegate to them. And almost the only question here, of much doubt and difficulty, appears to be, whether law, in the second sense or acceptation in which we have considered it, namely, as forming the object of moral science, in contra-distinction to the physical

sciences—in other words, whether the distinctions of right and wrong, in the conduct of intelligent moral beings, be dependent on, or independent of, the will of the Deity? In the darker ages of Christianity, particularly before the Reformation, a theological doctrine was prevalent, that all moral distinctions were created entirely by the arbitrary will of God. Grotius, adopting the views of Melancthon, maintained, that actions are intrinsically right or wrong, morally good or bad, and that natural law is immutable, and cannot be changed even by the Deity. And this doctrine of Grotius, again, appears to have been combated by various continental jurists, as well as theologians, particularly by Pufendorff, the Prussian chancellor Cocceii, and Heineccius, and latterly in this country by Dr Paley; and to have been supported on the other hand by equally eminent continental jurists, such as Thomasius, Leibnitz, and chancellor D'Aguesseau, and recently in this country by Stewart, Brown, and Mackintosh.* Now, so far as the question involves the nature of the Deity, it is manifestly beyond the limits of human knowledge. But if we follow the safe course of the inductive philosophy, and take observation and experience as our guide, we can have no doubt, that men have been so formed by their Creator, as to approve or disapprove of their actions in relation to each other, and also in relation to the Deity, and themselves, as morally right or wrong, indepen-

* See Grotius De Jure Bell. et Pac. L. I. c. i. § 10. Pufendorff L. I. c. ii. § 6, c. vi. § 4; L. II. c. iii. § 5. Samuel de Cocceiis Novum Systema Justitiæ Naturalis, Dissert. xii. Heineccius Elem. Jur. Natur. L. II. c. iii. § 62. Thomasius Fundamenta Juris Naturæ et Gentium. L. I. c. v. § 6. Leibnitz Observationes de Principio Juris, § 6. § 13. D'Aguesseau sur l'Origine de Justice, Med. I. See also the admirable Lectures on the Philosophy of the Human Mind, vol. iii., of the author's late inestimable friend, Professor Brown.

dently of the mere omnipotence of the Supreme Being, to render them happy or miserable. And accordingly, in the firm belief of such moral distinctions having a real existence, we obey the will of the Supreme Being, not merely as a power, which it is impossible for us to resist, but which, we feel, it would be not merely folly or imprudence, but ingratitude and moral guilt to wish to disobey. Nay, men are so constituted, as to entertain these moral sentiments, with reference to the conduct or operations of the Deity himself, as manifested in his creation and providence. Were they not so formed, they would be incapable of one of the purest and most sublime enjoyments bestowed on humanity, that of contemplating in his works, not merely the omnipotence, but the infinite wisdom and beneficence of God. And, without presuming to attempt to ascertain or determine, what appears to be withheld from men in their present state of existence, namely, such questions, as whether moral distinctions can exist independently of the Deity, whether they are necessary or voluntary laws of his nature, in the acceptation in which our limited intellects apprehend these terms, we may rest satisfied, with what appears to be the legitimate inference, that the moral distinctions, which their Creator has thus obviously formed men to feel and recognise, have an existence independent of men; and, if not derived from, are attributes of, and consistent, or coincident with, the all-perfect nature and will of the first, the greatest, the wisest, and the best of beings.

Revealed Religion.

The other mode in which the Divine law has, in aid of their natural powers of observation and reasoning, been more fully and distinctly communicated to the human race, is by direct and immediate revelation, either to a peculiar people, as the Jewish, or to mankind gen-

erally, as the Christian dispensation. And, as we had occasion to observe of law, in its second sense, namely, the moral law, the boundaries and objects of law in this third sense, as the will of the Supreme Being, either as discovered by the light of nature, or as directly revealed, are likewise far more extended and exalted, than the boundaries and objects of law, in the sense, in which we are to consider it, as forming the peculiar study of the lawyer; the former being the province of the natural theologian, the latter of the teachers of the pure and sublime doctrines and discipline of Christianity.

Human Law, as founded in nature, or as established by men.

In formerly tracing, and distinguishing from its metaphorical senses, what appears to have been the original or primitive sense of the term law, namely, command by a Supreme power, enforced by compulsory means, we found a fourth acceptation of the term, as human law, implying power exercised by man over man. And here the idea may perhaps have had its origin in the commands given by the father, as the natural head of the family, or by the chief or chiefs of the rude tribe, composed by the union of families. At all events, this is the leading idea in the term law, so far as it is established by men, for the regulation of the affairs of human life—of the interests of domestic or civil society —of the intercourse of individuals or nations. And in this, its apparently primitive, and strictly proper sense, law may be viewed, as the collection, or aggregate of the rules, which mankind have the power of establishing for the regulation of human actions, and of enforcing by human means, viewed either, as what ought to be established and enforced, or as what have been actually established and enforced in the shape of positive law.

CHAPTER II.

HISTORICAL EXAMINATION, HOW COERCIVE LAW HAS BEEN CULTIVATED AS A SCIENCE.

HAVING, by the successive and gradual limitation, of the significations of the term law, in our language, arrived at the acceptation, in which it forms the proper subject of study to the jurist and practical lawyer, to the statesman and legislator, we propose, next, to inquire, historically, how law has been cultivated as a science, or traced to its fundamental principles, as involving the exercise of physical power by man over man.

From a conviction of the unsatisfactory nature of many of the hypothetical theories of the foundation of law, promulgated by different philosophers, to be afterwards noticed, some eminent jurists, appear to have held the only sure foundation of law, was to be discovered in the positive or revealed will of the Supreme Being. And most certainly, had the all-wise Creator of mankind chosen to communicate to them by direct revelation, a complete system of laws for their government and direction, as inhabitants of this globe, human curiosity would have had nothing more to desire, human ingenuity would have had nothing more to aim at, than to learn and obey the dictates of unerring wisdom. But the experience of ages shows, that this is not the manner, in which the omnipotent Creator has, in his providence, thought fit to proceed. He has not deemed it right, to give to mankind directly from himself, either one uniform system for the compulsory control and

direction of their conduct in this world, or a variety of such different systems, adapted to the varied circumstances, in which they are placed on the surface of this globe. Most of the legislators among the nations of antiquity have, no doubt, found it expedient, to increase their influence, with an effect generally salutary, among rude and barbarous men, by ascribing the laws they introduced, to the Deity, or some supernatural power. But these laws were the work of men, not of God. Nor does sacred history record any direct communication from the Deity of any practical system of law for the compulsory regulation in detail, of the conduct of men associated in communities. For the laws of the descendants of Noah, so learnedly commented on by Selden, in his treatise, *De Jure Naturæ et Gentium secundum Disciplinam Hebræorum*, 1667, cannot be viewed in that light. And however salutary, and sublime its precepts, the decalogue was not only primarily designed for, and given to, a peculiar people, but presupposes considerable advancement in social institutions, and in the knowledge and practice of law, and by no means contains any detailed set of rules, adapted to the varied and complicated relations and transactions of civilized life. Nor, in the Christian revelation, has the Supreme Being, in this respect, departed from the usual course of his providence. For, while in addition to its evangelical doctrines, that revelation prescribes the purest, the most elevated, and the most beneficent system of morality, which mankind can conceive, for the regulation of their conduct in this world, adapted to every climate, and to every age; it contains no directions to mankind, for the construction of their social establishments, or for the compulsory regulation of their conduct, in their intercourse, as individuals, or as nations.

But, although the idea of the Supreme Being having, with his finger, inscribed his laws on the tablet of the

heart of man, may, in a philosophical view, be merely a sublime metaphor; although God has not seen fit, by direct revelation, to prescribe any particular systems of social government, or of civil or criminal legislation, to mankind generally, he has, as we shall afterwards have occasion more fully to observe, formed them with such powers, and placed them in such circumstances, as to enable them to discover, practise, and establish such rules of conduct, as, though imperfect, tend greatly to secure, and promote their happiness, during the period of existence assigned them on earth. Indeed, it was not to be supposed, as has been frequently remarked, that the all-wise, and omnipotent Being, who established the laws, by which this globe, and the material universe of suns and planets, exhibited to the wondering eye of man, are governed, would have allowed the mental and moral world to remain without order or regulation.*

In the absence, accordingly, of any direct and express manifestation of the Divine will on the subject of human legislation and jurisprudence, it appears, the foundation of law is to be sought in the human constitution, and in the external circumstances, in which mankind are placed on this earth; and is to be discovered by studying the individual and the species, as actually the subject of immediate observation, or as exhibited in the annals of past ages, and by such inductions, as the facts, thus ascertained, may warrant, agreeably to the method so successfully followed, in the mechanical and chemical sciences. But, as formerly observed, it has been long too much the fashion in the science of law, to despise a patient analysis, to be content with transient and partial

* Quis autem putet, Creatorem sapientissimum, qûi mundum hunc aspectabilem et physicum admirabili artificio, numero, pondere, et mensurâ digessit, moralem sine ordine et lege constituisse Lampredi Jur. Publ, Univ. Theor. p. I. c. y., vol. i. p. 122.

observation, to select from this defective observation some abstraction, or even to assume a mere fiction as a principle, and, under the influence of an excessive love of simplicity, to proceed to deduce from it the details of a systematic theory. It, therefore, becomes, in a manner, necessary to inquire historically, How law, in the strict sense, in which we are now considering it, has been cultivated as a science?

As soon as the attention of mankind came to be directed to the customs and laws, which had gradually, and almost imperceptibly, grown up, in particular communities, or nations, as objects of observation and inquiry, the distinction could not fail to be remarked, and, accordingly, appears to have been early recognised, between laws actually established, and enforced, and laws, which might, or ought, to have been, or which may, or ought, to be, established.

In investigating the legal relations of individuals, congregated in societies, jurists ceased in time to be satisfied with contemplating merely what was established, as positive law, in one particular country, and learned to take a higher, and more extended, view, of jurisprudence and constitutional law, generally; embracing frequently, however, what was apparently, and extensibly, instead of what was actually, and practically, just and expedient.

Among the Greeks, who, from a combination of co- Greeks.
operating causes, contributed so much to the advancement of mankind, in almost all the arts and sciences, the minute division into so many small, yet independent, states, which were so intimately, and multifariously, connected with each other, and yet maintained a frequent intercourse with foreigners, led to the cultivation of public and constitutional, or political, if not also of international law. Their private law, however, was little treated of, in particular works; their institutions

in this department, particularly those of the Athenians and Ionians, do not appear to have been sufficiently fixed, and steady, or permanent. The private law of one single small state could be of much importance, only, to a very few individuals; and even the arrangements for the administration of justice, were often, in several respects, an obstacle to the establishment of more stable principles. Socrates wrote nothing; and from the rather inconsistent accounts given by his two scholars, Plato and Xenophon, it is doubtful, what he may have taught of the philosophy of law. But, while he indulged his imagination to excess, in what is usually called his Republic, more properly constitution of a state, Plato propounded, with more sobriety, and correctness of reasoning, a theory of justice,—a system, in assumed circumstances, of the internal law of a state, in which may be recognised some of the best modern institutions. And Aristotle, more practical, acute, and profound, exhibited justice, and general expediency, as the foundation of political establishments, and discussed the different constitutions of government.

Romans. Among the Romans, the private law of a state was much more cultivated, than among the Greeks; but, till the later ages of the republic, philosophy was viewed by them, as quite remote from the actual business of life. They early distinguished, indeed, the *jus civile*, and the *jus gentium;* but, in this distinction, they contemplated neither the modern acceptation of the latter words, nor generally any philosophical inquiry into positive law. They merely marked by it, an occurrence in daily life; the *jus civile*, secured by formal judicial process, existing only among Romans, while the *jus gentium* took place, also, with, or among, strangers, and foreigners.* Cicero's extravagant attachment to, and

* Hugo Naturrecht. § 15.

admiration of, the institutions of his own country, appear to have indisposed him to the admission of any more perfect legal system. But he eloquently described law, generally, as independent of human enactment, as universal and immutable:—"Est quidem vera lex, recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna; quæ vocet ad officium jubendo, vitando a fraude deterreat; quæ tamen neque probos frustra jubet, aut vetat, nec improbos, jubendo, aut vetando movet. Huic legi, nec obrogari fas est; neque derogari ex hac aliquid licet; neque tota abrogari potest. Nec, vero, aut per senatum, aut per populum, solvi hac lege possumus. Neque est quærendus explanator, aut interpres ejus, alius; nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex, et sempiterna, et immortalis continebit; unusque erit communis, quasi magister, et imperator, omnium, Deus ille, legis hujus, inventor, disceptator, lator."*

The great merit of Ulpian, Papinian, Gaius, Paulus, and the other classical jurisconsults of the Roman empire, consisted in unfolding and arranging in their own system of law, the greater part of the rules, adapted to the various relations, or requisite for the regulation of the multifarious transactions, of private individuals, in a highly civilized, or advanced, state of society. Their mode of cultivating law, perhaps the most beneficial mode of any, consisted almost entirely in the practical development, and melioration, of their own national positive law. And we find little other general discussion, or arrangement of legal principles, than the collection of the *Regulæ Juris*, and the following descriptions of the different kinds of law:—"Jus naturale, quod

* De Republ. Lib. iii. Lact. Lib. vi. c. 8. Bipont. edit. vol. xii. p. 284.

natura omnia animalia docuit; jus gentium, quod naturalis ratio inter omnes homines constituit, quod apud omnes populos peræque custoditur, quod solis hominibus inter se commune est, quo omnes gentes humanæ utuntur." *Jus civile,* as distinguished from the *jus commune:*—"Omnes populi, qui legibus, et moribus, reguntur, partim proprio, partim communi, omnium, hominum, jure utuntur. Gaius. Cum aliquid addimus vel detrahimus juri communi, jus proprium, id est, civile, dicimus. Ulpian."* From these descriptions, the great Roman lawyers, appear, in a scientific view, to have held law to be founded on the animal, and rational, nature of man, and, historically, upon what was practically prevalent, among nations generally. Of any philosophical treatises, however, upon the *jus naturale,* or *jus gentium,* or upon any branch of positive law, no traces are to be found in their writings, but merely, here and there, a detached and insulated remark.

Middle Ages.

In the ages, which succeeded the subversion of the Roman empire, and in the state of social arrangement, which arose out of the division of the lands among the barbarian conquerors, we are not to look for any improvements in legal science. From the recent very learned researches of Professor Savigny, however, it appears, that, even during what are called the middle ages, the Roman law was never extinguished; but continued all along, and before the discovery of the Pandects at Amaelfi, to exercise a greater influence, than has hitherto been supposed. In the middle ages, too, however blameable the use, which they frequently made of the power they acquired, the clergy, rising to eminence, through the operation of almost the only popular principle, which then existed in society, and forming the great proportion of the educated classes of the community,

* See Ecloga Juris.

contributed materially to the improvement of the administration of justice among individuals. The jurisprudence of the canon law, as administered under the ecclesiastical jurisdiction, appears to have been more equitable, than the jurisprudence which was recognised and enforced by the half military, half civil, judicatories of these ages. The discovery of the compilations, made under the authority of Justinian, it is well known, led to crowds, and ages, and successive schools, of commentators on the Roman law. And the law of a nation, which for centuries had ceased to exist, having as the customary law of the conquered population, acquired, and all along maintained, a certain influence even among the barbarian invaders, who settled in the provinces of the empire, thus ultimately came directly and indirectly, to have most powerful effects in the formation and arrangement of the more regular legal systems of the different European kingdoms.

But the object of the present inquiry, is neither the Roman law, nor the canon law, nor the law of any particular nation; but how law generally has been cultivated as a science. And from the earliest period in modern times, since the revival of learning, it appears to have been the practice of jurists, who did not confine themselves exclusively to the study and illustration of the Roman digest, or to the study and practice of their own national laws, to trace the origin and foundation of all human or positive law, to what has been called the *Jus naturæ et gentium.*

Modern Times.

Passing over the juridical doctrines, which appear to have been maintained and discussed, in successive ages, by the scholastic theologians and moralists, who preceded the Reformation, we find the learned and amiable Melancthon, the disciple of Luther, in the earlier part of the 16th century, devoted the second book of his *Epitome of Ethics*, to various legal discussions, and par-

ticularly to the investigation of the first principles of universal law, and the distinction between the law of nature and positive law. In the course of the 16th, and beginning of the 17th centuries, also, and prior to the appearance of the great work of Grotius, Vasquius, a learned Spaniard, in his *Illustris. Contravers. Juris*— Suarez, a Spanish Jesuit, in his *Tractatus de Legibus*— Albericus Gentilis, an Italian by birth, but for some time professor at Oxford, in his work *De Jure Belli*, and Winckler in his *Tractatus de Principiis Juris*, all treated of the *Jus naturæ et gentium*, as the foundation of positive law; and exhibited the germs of many of those doctrines, which were afterwards more fully unfolded by their successors.* Bodinus, also, in the course of the 16th century, although like Plato and Sir Thomas More, too much under the influence of his imagination, yet treated very ably in his works, *De Republicâ*, and *Juris Universi Distributio*, of the leading general principles, not only of public or constitutional, but also of private or civil law; and broached doctrines, some of which, after the lapse of nearly two centuries, Montesquieu did not disdain to adopt.

The treatise of Grotius *De Jure Belli et Pacis*, which appeared in 1625, obviously originated in the wars, which accompanied the Reformation, and had then long distracted Europe, and deluged a large portion of it with blood. The work was composed and addressed, under an attractive title, to the sovereigns of Europe, and their ministers, if not in the hope, like some of his more sanguine successors, such as St Pierre, of persuading them to perpetual peace, at least with the highly laudable design, of introducing among belligerents, more humane usages than had formerly prevailed, and of showing, that the rules of justice and general expediency, are ap-

* See Groningii Bibl. Jur. Gent, Lib. III. cap. ii, iii, and iv.

plicable to nations, as well as individuals, in the commencement, in the conduct, and in the termination of wars. While this was his primary object, Grotius also devoted a large portion of his treatise to the discussion of the *Jus naturæ et gentium*, as the foundation of private, public, and international law. And the success, popularity, and influence of the work, appear to have been almost unexampled in modern times. But, however great its merits, in point of originality, and novelty, or otherwise, the arrangement of the work of Grotius, as a system of universal law, was, no doubt, defective,—chiefly in consequence of its being made subservient to the particular purpose just alluded to; and the expression was, in many instances, obscure. It was, accordingly, in conformity with the previous practice of modern jurists, soon followed by an almost innumerable series of commentators. And about the year 1672, his less acute, and profound, but more methodical and perspicuous successor, Pufendorff, laying aside the character of a mere commentator on Grotius, arranged of new, and enlarged, and illustrated, the doctrines of the *Jus naturæ et gentium*, into a general system of morals and politics, as well as of private and public law: which work was again greatly improved, about the beginning of last century, by the notes of its learned and able translator, Barbeyrac.

Towards the close of the 17th century, the celebrated Leibnitz embraced within the range of the multifarious occupations and attainments of his vast genius, the study of general jurisprudence; and besides his excellent dissertations prefixed to his "*Codex Juris Gentium Diplomaticus*," 1696, left his "*Methodus Nova discendæ docendæque jurisprudentiæ*," and his minor treatises "*De Principia Juris.*" In these works, he appears to have viewed the law of nature as the source of all human legislation; and actually recommended a treatise on the

philosophy of law.* His disciple Wolfius undertook the task, thus recommended, in his elaborate work, published about the year 1740, entitled "*Jus Naturæ Methodo Scientificâ, Pertractatum.*" But, resorting, apparently from his previous habits of study as a mathematician, to the parade of mathematical demonstration, he executed the task in a manner, much less successful, than that in which he followed out the other views and suggestions, which he derived from his great predecessor.

In the end of the 17th, and earlier part of the 18th century, the elder Baron de Cocceii, and his son, the Prussian chancellor, whom the great Frederick employed to reform the laws of his kingdom, and to digest the Code, which bears his name, hold all human law to be founded on the law of nature. The same view continued to be taken during the 18th century, not only by the Cambridge professor, Dr Rutherforth, and other jurists of this country, but also generally by the continental jurists of Germany, France, Holland, Switzerland, and Italy, such as Thomasius, Pestel, De Real, Bartamaqui, and Lampredi; and even towards the close of last century, Fichtè gave his philosophical disquisition on law, the title of "*Grundlage des Naturrechts.*" Rousseau considered the liberty of natural law, the perfection of humanity; and Mirabeau appealed to, and recognised a law of nature, according to which, he maintained, property had no existence. During the present century, Lepage devotes a large portion of his "*Science du Droit,*" to the "*Exposition du Droit Naturel.*" Fritot, in his "*Science du Publiciste,*" considers the principles "*du Droit Naturel,*" as the basis, not merely of a part, more or less extensive, of the science, but of the whole science; and, at this day, courses of lectures continue to be delivered, *sur le Droit*

* Leibnitzii Opera, by Dutens, Vol. iv. p. 261.

Naturel, et des Gens, in the French and German universities.

Such having been the views entertained by the most eminent jurists of the 16th, 17th, 18th, and even 19th centuries, it may be questioned, whether it was quite decorous in Mr Bentham, to treat, with so much contempt and ridicule, the opinions of his predecessors in the same walk of science, many of whom, perhaps, for the ages in which they lived, were at least equally distinguished by their original genius and scientific acquirements. It will, at all events, be more courteous, if not more philosophical, calmly and dispassionately to inquire, what jurists have really meant by the Law of Nature, and how they have prosecuted the study of that law, and endeavoured to ascertain its rules in detail.

Jus Naturæ et Gentium.

From the writings of the most eminent jurists in modern times, who have cultivated law generally, as a science, it appears to have been their primary object to discover, and establish, a sort of code of natural law, antecedent to, distinct from, and the prototype of all human or positive law; and, if they have not succeeded in the attainment of this object, or if it be difficult to ascertain and define exactly, what they have actually understood by the law of nature, we shall find that this want of success and difficulty have arisen, not as certain jurists seem to have supposed,* from their aiming at the discovery of laws, which had no actual existence, but from the erroneous and inaccurate mode, in which they investigated these laws.

I. In the first place, a great deal of confusion, of vagueness, and obscurity of thought and expression, have arisen among modern jurists, from not distinguishing at the outset, ethics or morals, from compulsory human

* Traités de Legisl. Civ. et Pen, ch. xiii. no. 10, Tom. i. pp. 133, 134.—Bentham's Works, Part ii. p. 300, Part ix. pp. 158, 160.

law, and from considering both under one general and common appellation.

Although the peculiar tenets of the sect of philosophers to which they belonged, may be traced in the writings of the classical jurisconsults of Rome, their views in philosophy do not appear, in the respect just alluded to, to have affected the soundness of their legal doctrines. Cicero recognised the distinction, by the different titles he gave his separate works, *De Officiis*, *De Legibus*; and although *Honeste vivere*, is included among the three grand precepts of law in the Roman digest, as well as *Neminem lædere*, and *Suum cinque tribuere*, the details of the digest appear to rest entirely on the two latter principles. Professor Hugo, indeed, seems to infer from the adoption of the precept, *honestè vivere*, as a rule of law, that the *jus gentium* of the Romans included the duties of conscience, or morality. But the only other authority for entertaining this opinion, which he adduces, is the passage in the *Digest* "*Quædam, tametsi honestè accipiantur, inhoneatè tamen petuntur*," fr. i. § 5, D. 50. 15. And these authorities do not by any means appear sufficient, in opposition to the uniform import and tenor of the particular rules of law actually laid down in the *Digest*, to show, that the Romans, in their *jus gentium*, any more than in their *jus civile*, enforced generally the rules of morality, or *præcepta virtutum*, or any other than the rules of justice, chiefly negative, which we shall afterwards see, admit of the application of force or coercion. Farther, the mere commentators in modern times on the Roman law, either historically as the code of a nation which had ceased to exist, or practically as a code possessing directly the force of law, which it does in a number of the European states; or, at least, as exercising an indirect influence on law, in the shape of written reason, which it does in others of these states, and is thus ad-

mitted to supply the deficiency of the existing codes, appear to have all observed and adhered to the distinction just noticed, and have discussed merely the doctrines of coercive law.

But in modern times, the most of the jurists, who have cultivated law generally, under the appellation of *Jus naturæ et gentium*, have neglected to recognise this primary distinction, at the commencement of their inquiries, have mixed up together ethics or morality, and coercive law, in a manner identifying them with each other, and have thereby been led to form vague and confused notions on the subject.

Without noticing his more immediate predecessors, to whom, however, he is more indebted for many of his doctrines than is generally supposed, Grotius himself recognises not only a *jus naturæ sociale*, or compulsory law, strictly so called, but also a *jus naturæ laxius*, which when examined, is nothing else than morals or ethics, or *præcepta virtutum*;* and having thus admitted two kinds or descriptions of law, when he comes to discuss the rules of law, as inferring legal rights, he is obliged to divide legal rights into two classes—perfect rights, which may be enforced, and imperfect rights, which cannot be enforced, such as rights to the gratitude or beneficence of others, which are in reality no rights at all; as also to recognise the equally useless distinction of *Justitia expletrix*, and *attributrix*.

Pufendorff, in the same way, in his treatise on the *Law of Nature and Nations*, gives a system of morals, jurisprudence, and politics, all mingled together; and not setting out with the radical distinction between ethics and law, but viewing the former as a branch of the latter, necessarily acquiesces in the doctrine of perfect and imperfect rights.†

* Proleg. § 12. lib. i. C. 1. § 7, § 8, § 9.

† Lib. i. chap. vii. § 7, and § 11.

Even the acute and profound Leibnitz, appears to blame Pufendorff for the encouragement (apparently very small) which he has given to the *opinio, quæ jus naturæ ad externa restringit;* and evidently includes morality under his definitions of justice and jurisprudence. Thus, in one of his letters to Kestner, Leibnitz writes thus :*—" Est ergo justitia, perfectio, sapientiæ conformis, quatenus persona se habet erga bona malaque aliarum personarum. Cuivis, equidem licet, jurisprudentiam suam ad res humanas, solamque hujus vitæ considerationem, restringere; quia et scientiam universalem mutilare per me cuivis licet. Omnem virtutem nostram, quatenus aliorum interest, ad jurisprudentiam pertinere, dubium nullum est; ut patet ex definitione justitiæ, quam attuli, et quâ efficaciorem datum iri, non puto. Ethicæ est, docere virtutem; jurisprudentiæ, hunc, quem dixi, usum ejus, ostendere."

Chancellor de Cocceii, in his *Proœmial Dissertation*, containing his *Novum Systema Justitiæ Naturalis*, (1748,) confines himself much more to law, strictly so called; yet even he, in answering the question, What is the difference between *jus naturæ*, and *præcepta moralia*, or *virtutum regulæ?* lays down the doctrine, that the precepts of morality are *pars juris naturalis*, so far as the latter respects the duties of man towards God.

In his voluminous work, published in 1740—1749, Wolfius also treated ethics, or morals, as a branch of the *Jus naturæ et gentium*, and repeated the doctrines of external and internal obligations.

In France, in the earlier part of last century, (1737,) Chancellor D'Aguesseau, in his *Meditations sur l' Origine de Justice*, considered justice and injustice, not as branch of, but as co-extensive and synonymous with

* Opera Leibnitzii, by Dutens, tom. iv. par. iii. p. 261.

the moral law. In England, Dr Rutherforth, in his *Institutes of Natural Law*, (1756,) discusses all the moral duties of man, and repeats the rather absurd doctrine of perfect and imperfect rights.

And about the middle, and towards the close of last century, the Swiss professor Burlamaqui, in his *Principes du Droit Naturel*, (1747,) the Dutch professor Pestel, in his *Fundamenta Jurisprudentiæ Naturalis*, (1775,) and the Italian professor Lampredi, in his *Juris Publici Universalis Theoromuta*, (1782,) all mingle together the doctrines of ethics and natural law.

Nay, even Mr Bentham himself, in his *Principles of Morals and Legislation*, (1789,) while he unquestionably traces the boundary between ethics and jurisprudence more distinctly, than any jurist had previously done, treats these doctrines, as branches of the same science, and derives them from the same source.

In his work on *Political Justice*, which appeared a few years after that of Mr Bentham, and which, whatever may be the truth, or tendency of its doctrines, is at least distinguished by the conclusions being the legitimate and necessary consequences of the premises, if once admitted, Mr Godwin likewise confounded the distinction between ethics and law; holding justice, or, according to his definition, the obligation to do all the good we can, to be imperative on the individual, and to comprehend all the moral duties of man.

Finally, so late as 1819, M. Lepage, in his work entitled *Elements de la Science du Droit a l' Usage de toutes les Nations*, considers law, as the science of the duties, to which man is subjected, in the internal, as well as in the external forum, as embracing the duties imposed by conscience alone, as well as those, which may be enforced by human tribunals.

This very general, and long prevalent, disposition, and habit, of the jurists, who cultivated the *Jus naturæ*

et gentium, to include under it, and confound with it, the doctrines of ethics, was obviously productive of very injurious consequences to both sciences. It led to great vagueness, and want of precision, of idea, throughout the whole discussions. And the law of nature came to be viewed, chiefly, as a collection of moral maxims, resolvable into other principles, still more general, not very consistent with each other, and frequently not at all applicable to coercive law, as a practical science. Thus, according to Thomasius,—"Per principium juris intelligitur, propositio aliqua, sub quâ reliqua præcepta juris naturalis omnia, tanquam, sub communi axiomate, comprehenduntur."—*Inst. Jurispr.* lib. i. cap. iv. § 2. And the varieties of opinion among jurists, as to the ultimate principle, or *lex fundamentalis, ex quâ reliquæ leges, tanquam conclusiones, demonstrantur*, may be classified under the following heads:—

1. Certain jurists, such as Pufendorff, Chancellor de Cocceii, Heineccius, and Domat, have resolved the law of nature into the will, permissive, or preceptive, of the Supreme Being, and the absolute power of the Deity as Creator, over his creatures.

2. Other jurists, such as Hobbes, and Spinosa, have held the first principle of natural law, to be *sui ipsius conservatio*, or *utilitas propria*, and that each individual is entitled to judge of, and to use the means necessary for, the promotion of his own welfare, whatever may be the consequences to others. But, in his treatise, though it exhibits great boldness and power of reasoning, Hobbes has pushed the consequences of this doctrine, to such extremes, as to amount almost to a *reductio ad absurdum*, and to a confutation of the doctrine itself.

3. Accordingly, the purely selfish system appears to have been abandoned by later jurists, or to have been modified into the system of rational self-love, or of the interest of the individual, well understood. Such an

enlightened view of the true interest of the individual, Chancellor D'Aguesseau has, as before noticed, shown, in his *Meditations sur l'Origine de Justice*, to be, if not the same, at least consistent with, and a strong incentive to, the discharge of all the moral and religious duties of man. And as almost identical with this enlightened self-love, may be ranked the principle of natural law, laid down by Thomasius,—"Facienda ea, quæ vitam hominis reddunt et maxime diuternam et felicissimam;" and the theory of professor Pestel, who traces "les fondemens de la jurisprudence naturelle, dans la route, qui conduit au bonheur."

4. Certain other jurists derive the law of nature from the benevolent and social dispositions and affections of the human constitution. Thus we have the *amor intellectualis* of Winckler, the *custodia societatis*, or *socialitas*, of Grotius and Pufendorff, the benevolence of Cumberland and Shaftesbury, and the sympathy of Adam Smith.

5. Certain other jurists have considered the law of nature, as composed of relations, discoverable by the intellectual faculties of man solely, and as resolvable into certain abstract principles, such as the *convenientia cum naturâ rationali* of the Stoics, Cudworth, Clarke, and others, the maxim of Wolfius, "Fac ea, quæ te, statumque tuum, atque aliorum, perficiunt," the maxim of Darjes, "Perfectionibus rerum vivas convenienter."

6. Certain other jurists consider the law of nature, as recognised, or felt, by the moral part of the human constitution, and trace its principles to the intrinsic qualities of actions, as right or wrong, as just or unjust, or rather to the judgments and feelings of moral approbation or disapprobation, which, from its constitution, arise immediately in the human mind, upon the contemplation of such actions, without any concomitant consideration of their consequences, as useful, or hurtful.

Thus, in his definition, or description, of the *Jus naturale*, Grotius represents it, not merely as the *dictamen rectæ rationis*, but as indicating, that there is an inherent moral turpitude, or moral necessity, in human actions, from their agreement, or disagreement, with the rational and social principles of the human constitution. —Lib. i. cap. i. § x. 1. And later jurists, such as Thomasius, have held the first and sole principle of natural law, to consist in the *intrinsicâ actionum honestate et turpitudine.*

To the three last classes belong all the jurists and moral philosophers, who maintain the existence of moral distinctions in human actions, as right or wrong, independently of considerations of utility, immediate or remote, private or public, whether perceived, recognised, or felt, by the intellect, or by a particular faculty, whether simple and original, or compound and derivative, whether by the understanding of Cudworth and Clarke, the moral sense of Hutchison, the moral faculty of Reid and Stewart, the practical reason of Kant, or the conscience of Mackintosh.

7. Other jurists, both ancient and modern, and in more recent times, in particular, Mr Bentham and his followers, confining their attention exclusively to the consequences of human actions, as useful, or hurtful, to the agent himself, to the individuals around him, to the community or nation, to which he belongs, or to mankind generally, found not only law, jurisprudence, and legislation, but likewise the doctrines of morals or ethics, upon general utility, or the production of the greatest quantum of happiness.

II. Which of the different general principles before enumerated, and to what extent any of them can be admitted, as the foundation of coercive, or compulsory law, we shall afterwards endeavour to ascertain. At present, proceeding with our inquiry into the mode, in which

law has been cultivated, as a science, we have, in the second place, to remark, that in their researches into the *Jus naturæ*, most jurists have not only confounded ethics with coercive law, and carried their attempts at simplification to such an extent, as to arrive at ultimate principles, so abstract and general, as to be of little practical utility, but many of them, adopting a kind of *a priori* mode of investigation, instead of the inductive method, have assumed general principles, not warranted by actual observation of facts, and have thereon constructed ideal theories of law and government.

If the Roman lawyers erred in founding the *Jus gentium* too much upon the general observance and practice of nations, if Grotius and his followers erred in adopting morality, or ethics, as the principal foundation of law, and inquiring chiefly, what conscience dictated with regard to the compulsory enforcement of legal rights,—later modern jurists erred equally, in adopting a metaphysical basis, solely, for law, and inquiring, what, in this respect is determined through the mere powers of the human mind. This remark is peculiarly applicable to the Wolfian philosophy, which, for a considerable period of last century, exercised a great influence, direct and indirect, over the jurists of Germany. The great defect of this system was, that its author, and supporters, attempted to demonstrate many truths, which must be derived from quite different sources, by mere philosophical reasoning, and ultimately, for the most part, only from gratuitously, or arbitrarily, assumed positions; while to them it appeared sufficient, for the foundation of a science, if a series of ideas and propositions were tied together, in a sort of reciprocal dependance, and were wrapped up in the exterior garb of a so-called proof or demonstration. In this way, Pütter informs us, " young people especially were led to believe they knew a great deal, while in reality they yet knew

nothing. And, what was worse," he adds, "people began so to underrate and neglect languages, philology, antiquities, history, observation, experience, positive laws, and all the sources of knowledge, to which the access is more laborious and difficult, than a definition, and demonstration, brought out merely by reflection or cogitation, that Germany then run great risk of falling back into an actual state of barbarism, if this taste had continued, or become more general, or universal."*

Certain other jurists have been led into error, and disputes, by confounding the historical origin of law, with the general principles, into which it may be resolvable, and by contemplating mankind, not as they have actually existed in society, as known to us from the authentic records of history, or as the objects of actual observation, but as existing in some state, whether of warfare, or of peace, to which no precise date can be assigned, but which is antecedent to the establishment of civil society, or in some other imaginary state, in which he is divested of many of his most characteristic attributes.

Thus Hobbes, Spinosa, and their followers, excluding from their consideration all the social and benevolent affections of mankind, have viewed them as living in a primeval state of warfare, each bent solely on the gratification of his own selfish desires, without any law, except that of the strongest, where right was synonymous with might.† But while it is obvious, that the origin of compulsory laws, among men, may, in a great measure, be traced, historically, to the collision, or supposed collision, of their individual wants, desires, and interests, it is equally manifest, this imaginary antecedent

* Pütter. Hugo Civilist. Magaz. ii. Band. p. 55.

† Hobbes de Cive. cap. i. § 7, and cap. ii. § 1. Spinosa, Tractat. Theolog. Polit. cap. xvi.

state of warfare affords no foundation whatever, for human legislation, except that legislation itself.

Thus, also, even the great Montesquieu tells us, that to know well the laws of nature, (of course, in the juridical sense,) it is necessary to consider man before the establishment of civil societies, and that the laws of nature will be those, which he would receive in such a state.* But that man ever existed in the state here supposed, out of society, history affords no evidence whatever; and to deduce laws from such an imaginary state, is quite contrary to the first principles of the inductive philosophy. In point of fact, we find man born in society, which is his actual, and constant, and may, therefore, be correctly termed, his natural state; and we find him constitutionally created with certain corporeal and mental wants, inclinations, and faculties, many of which require the aid of, or fit him for, or strongly induce him to live in, society; but some of which may come, or appear to come, in competition and collision with, the welfare of his fellow-men, and thus lead to actions, which it is the great object of human laws to prevent.

Nay, with all the contempt he expresses for the speculation of preceding jurists, on the subject of natural law, Mr Bentham himself, or his translator, M. Dumont, appears, in one passage, to have fallen into the error just remarked in Montesquieu. "All the general inclinations of men," he observes, "which appear to exist independently of human societies, and which must have preceded the establishment of political and civil laws, are called laws of nature, in the *true sense* of that word."† But upon what grounds, can the inclinations of men, which are independent of, or antecedent to, the estab-

* Esprit des Loix Liv. I. ch. ii.

† Traités de Legislat. vol. I. ch. xiii. § 10.

lishment of civil communities, if any such there are, beheld, or termed more natural, than those, that arise, and actually exist in civil society, in which, through its destined, and equally natural, progressive stages, man partakes of all the enjoyments, and exerts all the energies of which his nature seems susceptible, or which are allotted to him, on the surface of this globe.

Other celebrated modern jurists have founded law and government on entirely hypothetical data. There is first assumed a state of nature, though not decidedly a state either of peace or war, but in which man is guided solely by instinct; his actions have no morality, or justice; he has an unlimited right to every thing, that is necessary or desirable, or that he can obtain; in which he owes nothing to those to whom he has promised nothing, and recognises nothing as belonging to others, except what is useless to himself. Secondly, as promises and contracts are observed to be of great importance in creating legal obligations, there is assumed a primeval convention, or social contract, by which men are enabled to emerge from this state of nature, and to exhibit themselves, such as we find them, in civilized communities.*

But however ingenious the system of Rousseau may be, it is plain, we can never give the appellation of science to what is obviously founded, not upon facts, but upon suppositions of states and events, of which there is not only no evidence of their ever having existed, or taken place, but which, so far as experience goes, there is every reason to believe, never did exist, and never could take place. It does not appear from any historical monument, that in any country on the face of this globe, men ever met for the deliberate purpose of forming a people, and of regulating by a convention the

* Rousseau Contrat Social, Liv. I. ch. viii., ix. Liv. II. ch. vi.

terms of their association; and still less, that all the nations of the earth have, at the time of their formation, entered into a contract, conceived in the same identical terms. It does not appear, how such a contract could be validly entered into by individuals, incapable from age, of understanding its import, or how the men, who framed it, were endowed with such sagacity and foresight, that all future generations should be governed by this contract, without addition, or subtraction, or otherwise to cease to exist as a people. As little does it appear, how, or why, the present and future generations should be irrevocably bound by a contract, which they certainly have not made, and of which nothing indicates the existence. Indeed, there seems to be an absurdity in founding all law and government, upon a contract anterior to their establishment, whether we consider the physical force found necessary for compelling the fulfilment of contracts in civil society, or the more extended principle, into which, as we shall afterwards see, even the obligation to fulfil a contract resolves itself.*

Modern jurists, in general, it thus appears, have, in their investigations of the law of nature, confounded the principles of ethics and coercive law; have carried their generalizations to ultimate principles, chiefly applicable to morality solely, or so general as to be of little or no practical use in law; and have frequently first created systems by induction from imperfect observation, or even by the mere force of imagination, and then adapted the facts of history to these systems. The consequences of

* The inconsistency in the principles of this imaginary system, and the dangerous and mischievous consequences, to which it leads, are ably pointed out by M. Charles Comte, in his Traité de Legislat. Liv. I. ch. vi.—The fiction of the social contract, was invented by the political philosophers who preceded Rousseau, but towards the close of last century, was completely demolished by Mr Hume, and Mr Bentham.

such a mode of investigation have been great diversity of opinion, and various disputes about matters of little moment. Thus jurists have differed as to the number of the rules or maxims, which compose this natural code; some enumerating more, some less; the right reason of Domat, as M. Comte rather humorously remarks,* having discovered, at least ten times more natural laws, than the genius of Montesquieu. They have differed also as to the description of these rules; Domat laying it down, as a law of nature, that parents should leave or bequeath their estates to their children; while Montesquieu holds, that the law of nature ordains parents to maintain their children, but does not oblige them to make their children their heirs. They have likewise differed as to the comparative validity of natural, and of positive law; whether the former can be altered by the latter; Blackstone maintaining the negative, and others the affirmative. And they have entered into learned, but rather fruitless discussions, whether those institutions, which arise in the progress of civil society, such as the right of prescription, belong to natural, or to positive law.

Improved Cultivation of Law, as a Science.

While the great majority of modern jurists thus appear to have been led into errors, and unprofitable discussions, by the vague and inaccurate modes, in which they investigated what they called the law of nature, it is a singular fact, that more correct, judicious, and practical, and yet profound and enlightened views of law, as a science, had been unfolded, though with a brevity much to be regretted, by Lord Bacon, in the early part of the seventeenth century. There does not appear to be any sufficient reason to believe, that the *Treatises De Augmentis Scientiarum*, and particularly *De Justitiâ Universali, seu de Fontibus Juris*, were known to Grotius. At all events, Grotius, occu-

* Traité de Legislat. vol. i. p. 124.

pied chiefly with his grand object, the melioration of international law, if he was aware of Bacon's views, did not adopt them in the large portion of his work, devoted to the internal law of states. Still less were those views adopted by the successors of Grotius, such as Pufendorff and Wolfius. And it is not till about the commencement of last century, that almost any of the writers on the *Jus naturæ et gentium*, appear to have begun to entertain more precise notions of the proper province of law.

In Germany, Christian Thomasius, while he endeavoured to render the study of natural law more popular, by his *Fundamenta Juris Naturæ et Gentium, ex Sensu Communi deducta, in quibus secernuntur Principia Justi, Honesti, et Decori*, (1718,) although not very consistent in his theories, appears to have marked the distinction between law and ethics, and to have limited the *Jus naturæ*, to those principles, chiefly negative, which refer to our external conduct. His contemporary and successors, Gerhard, (1712,) and Gundling, (1734,) appear to have more clearly pointed out the distinction between natural law and morality, and considered the former as the theory of that part of our duties, which, in reason and equity, are exigible,—of the obligation which law, properly so called, strictly imposes.* And this view of the law of nature was still farther illustrated, and accurately traced, by Henry Kochler, in 1738, in his *Juris Naturalis Externi, seu Cogentis, Exercitationes*, and in his *Juris Socialis et Gentium ad Jus Naturale revocati, Specimina*. About the middle of last century, Baumgarten appears to have supported the same view of the law of nature. The Dutch Professor, Pestel, although he included moral duties under natural jurisprudence, at least marked the

* Tenneman, Manuel de l'Histoire de la Philosophie, par V. Cousin. Tom. II. pp. 130, 131, et pp. 169, 170.

distinction between the obligations, which may, and which may not, be enforced in society, as the distinction between *justitia* and *æquitas*; *Fundamenta Jurisprudentiæ Naturalis*, 4th Edit., 1788. And towards the close of last century, the celebrated Kant, in his *Metaphysische Anfungs gründe der Rechts Lehre*, 1798, 2d edit.; and Fichtè, in his *Grundlage des Naturrechts*, 1796–7, established in Germany the complete recognition of the distinction between ethics, and law or jurisprudence, between the morality and the legality of human actions.

In France, towards the middle of last century, the great Montesquieu, notwithstanding the vague generalities, in which he was apt to indulge, and which frequently misled him, as particularly pointed out by Destutt de Tracy, his late able commentator, did not, as D'Alembert's remarks, follow the example of his predecessors, in confining himself to mere metaphysical discussions relative to man in a state of abstraction, but extending his views over the different nations, which have existed in the different regions of this globe, considered laws, as flowing from, or applicable to, or modified by, the social nature of man, the different forms of government, which arise in the progress of civil society, and the different circumstances, in which nations are placed, such as climate, soil, population, and commerce. About the same time, President Goguet traced, with great learning, the origin of laws and customs, as well as of the other arts and sciences among the most ancient nations. And although Pothier, Valin, and Emerigan, are more strictly to be considered as writers on French law, it must be admitted that they, particularly Pothier, in substance detailed the private coercive law of civilized man, on the subjects, of which they treated.

In Italy, about the middle of the last century,

Beccaria successfully unfolded the general principles of penal law; and, in the language of Voltaire, gained the applause of Europe, by having demonstrated, that punishments ought to be proportioned to offences. And, in his *Scienza della Legislazione*, 1780—1785, Filangieri, at greater length, illustrated the general rules of legal science, embracing the doctrines of political and economical law, of criminal procedure, offences and punishments, and of laws relative to national education, and to public and religious instruction.

In England, subsequent to the time of Lord Bacon, Selden, Hobbes, and Cumberland, had discussed the doctrines of the *Jus naturæ et gentium;* Locke had ably illustrated the principles of constitutional law, and of free governments; Sir Mathew Hale had traced the history of the common law, and propounded an analysis and digest of the law of England, and urged the necessity for its amendment; a series of distinguished judges had elucidated the principles of maritime and commercial jurisprudence, and Blackstone had popularized the doctrines of the laws of his own country; but no author appears to have exactly taken the path, pointed out by Lord Bacon, in tracing those principles of general jurisprudence, those *leges legum*, which pervade the codes of all nations, till the appearance of Mr Bentham's treatise on the *Principles of Morals and Legislation* in 1789, and the lectures of Sir James Mackintosh in 1799.

In Scotland, Buchanan in his treatise *De Jure Regni apud Scotos*, had exhibited views of public law, worthy of the contemporary of Bacon and Grotius, and of the predecessor of Locke. The views of Lord Stair, on the subject of legal obligation were profound; and from the middle of the last century, the study of law, as a science, made considerable progress. Lord Kames, had, in a great measure, the merit of originating this

study. Professor Fergusson, adopting the views of Montesquieu, produced an eloquent essay on the *History of Civil Society.* Principal Robertson and Gilbert Stuart, the not unsuccessful imitator of Tacitus, traced the progress of society in modern Europe. In his *History of England,* and in his *Essays,* Mr Hume investigated the fundamental principles, and marked the progress of several of the more important branches of law, public and private. Dr Adam Smith pointed out the distinction between justice, and the other virtues, inasmuch as the former was susceptible of enforcement. And Professor Millar, following up, and extending the views of Lord Kames, while he taught the doctrines of the Roman law, delivered, also, for many years, courses of truly philosophic lectures on general jurisprudence, and on government; part of which have been given to the world, in his treatise on the *Distinction of Ranks in Society,* and in his *Historical view of the English Government.*

The result of the more correct views of law, as a science, which thus came to be entertained towards the close of the eighteenth century, in the different countries of Europe, has been the establishment of the two great modern schools or sects, into which the scientific students of law throughout Europe, appear to be divided; and which have been termed, by the continental jurists, the analytical school, of which Mr Bentham may be called the founder, and the historical school, which is chiefly prevalent in Germany, and of which Professors Hugo and Savigny are the great leaders.*

Mr Bentham's views on morals and legislation, although maintained, of late years, by a numerous body of admiring pupils, and staunch supporters, particularly

* See M. Rossi De l'Etude du Droit; Annales de Legisl. et de Jurisp. 1820.

in London, were, till the recent publication of his whole works, now in progress, communicated to the continental, and even to the British public, chiefly through the medium of M. Dumont, the philosophic translator of his manuscripts; and have hitherto, perhaps, made a stronger impression among the southern nations of Europe, than even in his own country. When limited to law, strictly so called, and not pushed to the exclusion, or destruction of the moral feelings of our nature, with which they are by no means incompatible, his doctrines, and particularly his exhaustive analysis, and acute and profound discrimination, have been of very great service in promoting the philosophic cultivation of that important science.

Towards the end of last century, and even before the appearance of the juridical treatises of the philosophers Kant and Fichtè, the learned jurists of Germany had adopted more correct, enlarged, and philosophic views of the science of law. In particular, Professor Pütter had not only successfully exerted himself in improving the mode of teaching the Roman law, but, as Professor Hugo informs us, was one of the first in Germany who felt the want of a system of general civil jurisprudence, and urged the cultivation of the *Jus naturæ*, as the philosophy of positive law. Profiting by, and improving upon, the views of Pütter, three of his scholars, Reitemeier, Hufeland, and Hugo, in separate publications, in the course of the year 1785, all, independently of each other, and each in his own way, concurred in maintaining, that philosophy ought to be combined with jurisprudence, in a quite different manner from that, which had been hitherto usually adopted. Of these young jurists, Hugo was by far the ablest, and soon became the most distinguished. Admiring greatly the chapter on the Roman law, in Gibbon's *History of the*

Decline and Fall of that Empire, he translated it; and while similar views of the mode of studying law, were inculcated in Scotland, by Lord Kames, Gilbert Stuart, and John Millar, Hugo, to all appearance ignorant of this fact, had the merit of completely changing the method of teaching law in Germany, and exhibited in his *Geschichte des Römischen Rechts*, a model for the historical investigation of the positive law of a people. With regard, again, to the cultivation of law generally, as a science, the views of Hugo were, apparently without any previous communication between the parties, confirmed by Schlosser in his *Briefe über die Gesetzgebung*; and are more fully expounded by himself in his *Juristichen Encyclopædie*, and in his *Naturrecht, als eine Philosophie des Positiven Rechts*. His pupil and friend Professor Savigny of Berlin, likewise of pre-eminent talents and industry, has still more fully developed the general doctrines of the historical school of law; and has distinguished himself not only by his erudite *History of the Roman Law during the Middle Ages*, but by his admirable tract *Von Beruf unserer Zeit für Gesetzgebung und Rechts Wissenschaft*, written in answer to the likewise able treatise of Thibaut, and apparently so far, in opposition to the attempt of the French emperor, to force his code upon the German nation. The learned researches of this school have also been continued and greatly promoted by the labours of Niebuhr, Eichorn, and Göschen.

The leading doctrines of these schools, we shall have occasion farther to consider, when we come to inquire, whether, and to what extent, there exists a law of nature, in the sense of the jurists, such as to form the foundation and model of all positive law, how it is discoverable, and how it may be cultivated with success.

But previously to such inquiry, it may be proper we should, agreeably to the more correct views of the science of law more recently entertained, examine and mark a little more in detail, the boundaries, which separate and distinguish it from the science of ethics or morals.

CHAPTER III.

WHAT IS THE PROPER SPHERE OF LAW, THE EXTENT AND LIMITS OF ITS OPERATION, AS DISTINGUISHED FROM ETHICS—WHAT THE DISTINCTION, BETWEEN MORALITY AND LEGALITY—WHAT THE FUNDAMENTAL PRINCIPLES OF COERCIVE LAW.

In its general sense, coercive law may be viewed either as a branch of ethics; or as a separate science, resting upon other, or different principles, but not inconsistent with, or at all subversive of ethics. In marking the boundaries between the two, and investigating the principles, on which they are respectively founded, we shall embrace both views. And we may only here so far anticipate our future inquiries into the general divisions of law, as to remark, that the distinctions, or contrasts, between morality and legality, are to be traced, not so much in the public or constitutional law of states, embracing the reciprocal relations of the members of the community, and of the state or government to each other; as in the private law of states, comprehending the reciprocal relations of the members of the community to each other, as individuals living together, and having intercourse in society.

Law, as a Branch of Ethics.

I. Ethics, it is plain, embrace all human actions, virtuous or vicious. If we obey the high dictates of morality—if we consult our real happiness here and hereafter—if we aim at the degree of perfection, of which our nature is susceptible, then, undoubtedly, every man ought to perform all the virtuous, and to

abstain from all the vicious actions in his power. At the same time, it is equally obvious, that, with regard to many virtuous, and even some vicious actions, so far as human power, and physical force extend, we are left at liberty to perform, or not to perform, them; and that compulsion ought not to be applied by human power, whatever other method may be justifiable or expedient. The heart that glows with disinterested benevolence, scorns such an ignoble motive; and the more delicate feelings of sympathy shrink from the rude touch of physical force. A man is disliked or despised for his ingratitude, or avarice; and is not one, whom the impartial spectator would choose to be his friend. Yet compulsory gratitude would involve a contradiction, or absurdity; and to wrest his treasure from the miser for purposes, however beneficent, would be an outrage on the common and ordinary feelings of mankind.

On the other hand, it is equally manifest from experience, that there are certain virtuous actions, which mankind may and ought to be compelled to perform, and certain vicious actions, from the performance of which, they may and ought to be restrained. It would be contrary to all ordinary notions of right and wrong, that a man should be allowed to throw off and abandon the infants he has begotten, that he should be left at liberty to break his engagement with his neighbour, after having reaped all the benefit he could from it, or that he should be permitted with impunity to wound the person of his neighbour to gratify improper resentment, or by force or fraud to deprive his neighbour of the fruits of his labour and industry. But what precisely are those virtuous actions, which may be the subject of compulsion,—what those vicious actions, which may be the subject of restraint?

Upon examination it will be found, that the actions, which agree in this respect, and have the common

quality of susceptibility of injunction or prohibition by force, and thus form a distinct class, may be referred to what, in ethics, has, in a strict and proper sense, been denominated the virtue of justice. All the other virtues, either relate immediately to the agent himself, such as temperance and prudence, and may therefore be safely left to the regard of the individual for his own welfare and interest, being comparatively of less importance to other men; or, like the disinterested zeal of friendship, or general benevolence, they imply a delicacy of feeling, or some active exertion, or sacrifice on the part of the agent, which are altogether abhorrent of compulsion, or may often rise to a degree of moral excellence, to which all men in all situations are by no means able to aspire. But the virtue of justice is different; all its rules involve a connexion with our fellow-men; and are in general rather of a negative nature, and become positive chiefly through the voluntary act of the individual subjecting himself to the obligation. They enjoin an abstinence from all undue interference with the concerns of others, and the faithful performance of all positive engagements, and of those necessary duties, the neglect of which implies a high degree of moral turpitude, and is productive of suffering to other individuals, and detrimental to society at large. The rules of justice, too, are not of a vague nature; they may, comparatively, be accurately defined; and they may be observed and put in practice by all men in all situations. Besides, the practice of this virtue is perhaps more requisite, and of more importance, in the present state of society, than that of all the other virtues combined. For, although the practice of the other virtues, particularly of beneficence, is a source of far more exquisite enjoyment to the agent, than the strictest adherence to the rigid rules of justice, yet from the general observance of these rules, there results, upon the whole, to society, a greater good

than can be obtained by the most splendid exertions of single minds.

But, it is only, when the term justice is used in its strict and proper sense, that the distinction we have been tracing holds good; and it is, therefore, necessary to mark that sense more precisely. The term *Justitia* has been employed by some moralists and jurists, in an extensive sense, as one of the cardinal virtues, to denote the performance of all the moral duties we owe in conscience to our fellow-men, instead of those duties only, which we may be compelled to observe. In this vague sense, justice is nearly equivalent to benevolence or beneficence; and this application of the same term to two ideas really different, has occasioned a good deal of obscurity and misapprehension, and led to the division of *justitia* into *attributrix* and *expletrix;* and the consequent division of rights into perfect and imperfect. This mode of proceeding, however, is truly absurd, inasmuch, as it first connects verbally things really different and distinct, and then grounds a distinction on this grammatical connexion, for which there is no foundation in nature. *Justitia attributrix* is nothing but benevolence or beneficence, the duty which, in a moral sense, we owe our neighbour, but may, or may not perform. *Justitia expletrix* is merely justice in its proper sense, to enforce the rules of which, compulsion may be applied. A perfect right, as we shall afterwards see, is nothing but a right in its proper sense, the having a rule of justice in one's favour, which may be enforced. An imperfect right is no right at all; for it is absurd to say, one has a right, when he cannot enforce it, without a direct injury to another.

Further, it is also necessary here to observe, that even in its more strict sense, justice has two acceptations. It either signifies, in the sense in which we have all along used it, those rules of conduct towards our fellow-men,

of which the non-observance is productive of, or attended with positive evil, direct, or indirect; or it implies the moral habitual disposition to observe these rules, and also to form a fair estimate of the views, sentiments, dispositions, and characters of others, which, as beautifully illustrated by Dugald Stewart, constitute the virtue of probity or candour. In the former sense, the Roman lawyers generally expressed the idea by *jus, justum,* or *justa;* in the latter sense by *justitia,* as when they say, "Justitia est constans et perpetua voluntas suum cuique tribuendi." But justice considered as synonymous with probity, or candour, as a meritorious and laudable disposition of mind, cannot obviously be produced by compulsion. If a man conforms in his external actions to the rules of justice, from whatever motive his conduct may proceed, it is all that can be justly demanded of him. And accordingly jurisprudence is described by the Roman lawyers, as *justi injustique scientia.*

There is, thus, in the proper sense, to which we have restricted it, a radical distinction between justice, and all the other virtues; there is manifestly a foundation in nature for the application of physical coercion to the rules of the former virtue, while the latter must necessarily be left to the discretion of the individual. And in marking this distinction, we appear to a certain extent, to have ascertained not only the true sphere of human law, the limit, within which mankind are entitled to employ the remedy of physical force, for the promotion of the good of the species, but also the principle, or one of the principles, on which coercive law is founded. So far at least, as depends on the feelings and judgments of moral approbation or disapprobation, generally, if not universally entertained by mankind, justice may be propounded as a fundamental principle of law. And in the ordinary understanding and language of civilized nations, justice is held to be the model of perfection, the *beau ideal,*

at the realization of which all human law ought to aim, whether in the determination of particular cases and questions, or in the establishment of general rules. And with this foundation of coercive law, several of the later eminent jurists and philosophers have rested contented, as an amended and more practical exposition of the *Jus naturæ* of their predecessors, as founded not on fictitious states of nature, antecedent to the establishment of civil society, or on fictitious contracts, by which men passed from such imaginary states into a state of social or civil union, but as adapted to all the successive, and equally natural states, through which mankind are obviously destined to pass, in the gradual development and application of their faculties, as individuals, and in the progressive advancement of particular nations, or of the species at large.

Thus Professor Pestel, in his *Fundamenta Jurisprudentiæ Naturalis*, (1775,) while he unfortunately mingles together ethics and jurisprudence, concludes with the exposition of justice, as the foundation of natural compulsory law. Thus, Destutt de Tracy, the able commentator on Montesquieu, (1819,) represents *Le Juste*, and *l'Injuste*, as existing before all positive laws. Thus Lepage (1819,) commences his *Elements de la Science du Droit*, with a chapter on justice and injustice. Thus Adam Smith, that truly eminent philosopher, observes: "The rules of municipal law, are in general intended to coincide with those of natural justice. It does not, indeed, always happen, that they do so in every instance. Sometimes what is called the constitution of the State, that is, the interest of the government, sometimes the interest of particular orders of men, who tyrannize the government, warps the positive laws of the country, from what natural justice would prescribe. In some countries, the rudeness and barbarism of the people hinder the natural sentiments of justice from arriving at that ac-

curacy and precision, which, in more civilized nations, they naturally attain to. Their laws are, like their manners, gross, and rude, and undistinguishing. In other countries, the unfortunate constitution of their courts of judicature, hinder any regular system of jurisprudence from ever establishing itself among them; though the improved manners of the people may be such, as would admit of the most accurate. In no country do the decisions of positive law coincide exactly in every case, with the rules, which the natural sense of justice would dictate."

Thus Kant, also, while he elucidates, as we shall afterwards see, with great acuteness, the distinction between morality and mere external legality, if he does not resolve the latter into the former, at least makes the latter consequent, and in a manner dependent upon the former; inasmuch as he holds, that the idea or sentiment of duty or obligation arises only through the moral imperative of practical reason, and that from the idea of moral duty thus obtained, is subsequently unfolded the idea of the power to bind another to a duty, namely, the idea of a right.

Nay, Bentham, the great opponent of a *Jus naturæ*, and of a moral sense or faculty, himself recognises the separate existence of a moral sanction; to which as influential in positive law, it is not easy to attach any other distinct notion, exclusive of the sanction of the opinions and feelings of men, as to the justice or injustice of human actions.

Law, as distinct from Ethics.

II. Hitherto in tracing the boundaries between ethics and coercive law, and in endeavouring to ascertain the ultimate principles, on which coercive law is founded, we have considered law, as merely a branch of ethics, embracing only the virtue of justice, but bearing with it all the moral sanction of that virtue, and superadding compulsion, or enforcement, by such means, as are placed

at the disposal of man. But, although we have thus attained a general or ultimate moral principle, as the foundation of positive law, and judicial coercion, it has been argued, and may be maintained with some degree of truth, we have not thereby made great progress, or at all exhausted the subject. For, first, the moral sentiments of mankind, it is contended, have been, and are various, in different countries, and in different stages of civilization; and, therefore do not afford an external, independent, and uniform standard, as the foundation of positive law. Secondly, the boundaries between the virtue of justice, and the other virtues, or even the rules in detail, comprehended under the term justice, are not so distinctly defined by the traditionary and recorded experience of mankind, as to fix the limits of compulsory law. And, although it would be a very unwise legislature, or government, that did not avail itself of the moral, and also of the religious sanction, in promoting the right conduct and welfare of the citizens or subjects of a state, it may, for the reasons just assigned, be of advantage to view law, apart from, and if not altogether independent of, as not entirely founded on the feelings and judgments of moral approbation, and disapprobation; and, to proceed in the consideration of law, as we do in the mechanical and chemical sciences, of which the object is to extend the power of man, and enlarge the sphere of human enjoyment, or in the sciences of anatomy, physiology and medicine, of which the object is the conservation of the health of the human species. Indeed, this mode of investigating law, is, in a great measure indispensable, as there are obviously a vast number of actions which men perform individually, or in the intercourse of civil society, with a view to the supply of their corporeal wants, their subsistence, their shelter and clothing, and their comforts generally, to which the appellation of just or unjust, in a moral sense, is not applicable, but which form a

great part of the subject of positive law, which are, in point of moral justice, indifferent, and for the regulation of which, almost all that is requisite, is, that a rule should be fixed and made known.

In the general ultimate ends, to the attainment of which they are directed, ethics or morality, and law, jurisprudence and legislation, whether considered as sciences or arts, appear so far to coincide; the object of both being to promote the virtue, happiness, and general welfare of mankind, by the regulation of human actions. But they differ essentially in the means, which they employ for the attainment of these ends, in the extent and mode of their operation, in the nature or description of the actions, which they seek to regulate. And upon further investigation, these differences may be found to be so great, as to afford grounds for holding them to be separate and distinct sciences.

Ethics address the more elevated feelings, and nobler sentiments of our nature; appeal to a standard of moral rectitude, contemplate the high destinies of men here and hereafter, and convince the understanding by lessons of wisdom, derived from experience. Law confines its views to the arrangement of matters on this terrestrial globe; and employs as its means of control, and direction, the motives and considerations, which arise out of, or are afforded by, the exercise of that physical power, which the author of nature has placed at the disposal of men, when united in society.

Ethics embrace not merely all the external actions of mankind, but all their internal actions, thoughts, feelings, and volitions, with a view to the regulation of their conduct in this life, whether in relation to their Creator, their fellow-men, or themselves, and in contemplation of higher degrees of moral excellence and happiness to be attained in the future stages of their existence. Law does not extend to the internal actions, thoughts, feelings, and

volitions, of men; but embraces only their external actions in this terrestrial world, and chiefly, if not solely their external actions in relation to, and affecting each other.

In all laws for the regulation of human actions, whether internal or external, Kant has acutely remarked, two things are involved: First, the rule which represents the action to be performed, as necessary, or which makes the action a duty; secondly, the motive, which, in the mind of the agent, connects the ground for the determination of the will to this action, with the idea of the rule. By the first, the action is viewed as a duty, which is a mere recognition of the possible determination of the will, or a practical rule. By the second, the obligation so to act, is combined in the mind of the agent, with a ground, generally, for the determination of the will. All such laws, therefore, may be distinguished in respect to the motives to conform to them. Those which make an action a duty, and this duty at the same time the motive, are ethical. But those which do not include the motive in the law, and consequently admit other motives, than the idea of the duty itself, are juridical. With regard to the last, it is plain, that the motives, distinct from the idea of duty, must be taken from the pathological grounds for the determination of the will, inclinations, and aversions; and among these, from those of the latter kind, because law implies necessity or compulsion, not allurement and invitation. Accordingly, we call the mere conformity, or disconformity of an action with the law, without regard to its motive, its legality; but the co-existence of the idea of duty, derived from, or imposed by the law, as at the same time the motive of the action, its morality. Hence, also, while juridical duties, *Officia juris*, admit of external regulation and enforcement, moral duties, *Officia virtutis, ethica*, cannot be subjected to external legislation,

because they contemplate an end, or object, which, or to aim at which, is, at the same time, a duty, but which cannot be attained or effected by any external compulsory operation, or regulation, in consequence of its being an internal act of the mind.*

Law, then, is conversant solely with external actions, deals chiefly in negative precepts, relative to the external conduct of men, and inquires into internal volitions, and the motives, which may have operated, not with a view to their virtuous or vicious nature, but chiefly, if not solely, for the purpose of ascertaining, whether the act under consideration, was the voluntary and intentional act of a rational being, such as to render him responsible for the consequences, or was caused by physical force, or was otherwise involuntary. Law does not aim at making men virtuous, it is content with ensuring, or attempting to ensure, such external conduct, as may allow each individual to prosecute his exertions for the promotion of his own welfare, without preventing, or obstructing the welfare of others.

So distinct are the two sciences, that, as Fichtè has observed, moral duty is in a variety of instances, if not opposed to, at least different from legal duty.† Morality commands or enjoins the performance of virtuous actions. Law is permissive, in as much, as it does not command any individual to exercise his legal right, but allows him to use it or not, as he chooses. Nay, morality often forbids the exercise of a right, which, it must be admitted on all hands, does not, on that account, cease to be a right. In such cases, the popular remark is, "He had a good right to do so, but he should not have availed himself of it." But the same system of

* See Kant, Metaphysische Anfangsgründe der Rechts lehre, 1798, Einleitung, § 3. pp. 13, 14.

† See Fichtè Grundlage des Naturrechts, 1796, 1797. Vol. I. p. 51, &c.

law cannot, in consistency with itself, in precisely the same cases, and at one and the same time, both give and take away the same rights, or prescribe and prohibit the same actions. And morality and law, therefore, appear, so far at least, to rest on separate and distinct principles. Whether, in many respects, the moral law may not give an additional sanction, and efficiency, to the legal rule, is a different question. And there can be no doubt, that it happily does so, to a great extent. But co-operation, and similar joint tendency, do not necessarily prove identity of principle. And the solution of the difficulty seems to be, that while the principles of morality and law are separate and distinct, there is in reality no opposition, or at least, no collision between them; the protection of the legal right being necessary to admit of the exercise of the higher moral functions of humanity.

Farther, although happily aided, to a vast extent, by the benevolent feelings and dispositions of our nature, coercive law does not necessarily presuppose the existence of such feelings and dispositions. It must exert its force, although such feelings and dispositions did not exist among mankind, and must provide for the cases of their non-existence. It presupposes chiefly, if not solely, the regard of each individual for his own welfare, and its aim, is the accomplishment of the desired order of things, by physical power.

Finally, coercive law, as we shall afterwards have occasion to remark more in detail, when inquiring into its sources and development, evidently contemplates men as living in society, or in communities, and in intercourse with each other; and it is not only confined to external actions, but to the practical relations of individuals towards each other, so far, as their actions, as events, can have an influence upon each other, immediate or remote. Every individual man on the surface of the

globe, has obviously certain limited powers of action, mental and corporeal, bestowed on him by his Creator. In the exercise of these powers, he has, obviously also, a limited sphere of voluntary action, which may affect the exercise of similar powers, bestowed by the author of nature, on the other individuals, with whom he lives in society, or has intercourse. And, although general definitions are rather to be avoided in the sciences, on account of the great risk of error, perhaps the notion of legal right, and compulsory law may be correctly enough described, as has been done by Kant, and also by Fichtè, though on a different ultimate basis. Thus, legal right, between or among men living in society, may be described as being the condition that each individual shall limit his freedom, or sphere, or range, of voluntary action by, and consistently with, the similar freedom or sphere, or range, of voluntary action, also belonging to every other individual, according to an universal, or at least common and general rule of reciprocal conduct. And law may be described as being the aggregate, or collection of the conditions, under which the will, or voluntary action of one individual may be reconciled, or made consistent with the will or voluntary action of the other individuals living in society, according to a common and general principle of freedom from compulsion.

But this rule of reciprocity and consistency in the actions of individuals, which influence the welfare of each other in society, expounded by the two eminent juridical philosophers, just alluded to, as the characteristic of legality, in contradistinction to morality, like the legal maxims, *neminem lædere*, and *suum cuique tribuere*, recognised by previous jurists, is of little practical use, in its wide generality, or until applied in detail to the various interests, transactions, and arrangements, of civil society. It has indeed the advantage over the view of law, as the virtue of justice, or as a branch of ethics, that it does

not appeal, so much, to feeling or sentiment, which may be variable, according to the temperament, education, and situation of different individuals; but contemplates human actions, as external events, attended with certain consequences to the individual agent, to other individuals, with whom he has intercourse, and to the community or nation of which he is a member. But the problem still remains to be solved, What are the spheres of action allowed or allowable to men, as individuals, united in society, consistently with this general rule of reciprocity? How far are these spheres limited or extended, not merely by abstinence from personal aggression, but by the institutions, which arise in the progress of society, such as marriage, and the connexions of family and kindred—the institution of private property, and the division of the interests of which it is composed—the enforcement of contracts? How, in the regulation of their actions, as affecting each other, are the interests of each individual to be reconciled with those of other individuals, or, of the whole, so far as practicable, in the circumstances in which mankind are placed on this earth.

But, as thus followed out, and traced to its root, the principle of legality, as distinguished from morality, namely, the combination of the freedom of action and welfare of each individual, with the similar freedom of action and welfare of other individuals, and with the good order and prosperity of the whole community, appears to differ very little indeed, from, or rather to be resolvable into, the principle of general expediency, as ascertained from the observation and experience of the effects of human actions—of the actions of beings, constituted and situated as men are, on this earth. And certainly this is no new discovery, and still less, a discovery reserved to be made, towards the close of the eighteenth century.

General utility, or the promotion of the happiness of mankind, M. Charles Comte has truly observed, is not a principle peculiar, or solely applicable to law, jurisprudence, or legislation; it has been the professed and real object of all the sciences and arts, which have occupied the energies of men, since they were first placed upon the surface of this globe, and has been recognised as at least one of the foundations of law, by many of the leading philosophers and jurists, both of ancient and modern times.

In his work *De Republica*, what Plato proposed was to describe the form of government under which men might enjoy the greatest possible amount of happiness. Aristotle, in his *Treatise on Politics*, had no other view; his doctrine being, that all governments which have for their end the welfare of the citizens, are good, and that justice itself is nothing else than the common utility or welfare.* And Cicero repeats the doctrine of the Grecian philosophers:† "Omnino, qui reipublicæ præfuturi sunt, duo Platonis præcepta teneant; unum ut utilitatem civium sic tueantur, ut quæcunque agunt, ad eam referant, obliti commodorum suorum; alterum, ut totum corpus reipublicæ curent, ne, dum partem aliquam tuentur, reliquas deserant."

Nor has any opposite or different doctrine been maintained by the generality of modern philosophers and jurists. For, while they have in general reprobated the theory of private utility, or the selfish system, as the foundation either of morality or law, they have distinguished between utility, apparent and real, present and future, temporary and permanent, private and public, or general or universal, and have recognised the latter, although not sufficient to account for the moral senti-

* Aristot. Pol. Lib. iii. c. iv. § 9, and c. v. § 1, 4, and c. vii.

† Cic. de Off. Lib. i. c. xxv.

ments of mankind, relative to the distinction of right and wrong, in human action, as forming one of the great foundations of human laws and institutions.

Thus, early in the 17th century, Grotius, Prolegomena, § 16, 17. "Sed naturali juri, utilitas accedit; voluit enim naturæ Auctor, nos singulos, et infirmos esse, et multarum rerum ad vitam recte ducendam egentes, quo magis ad colendam societatem raperemur: Juri autem civili occasionem dedit utilitas, nam illa, quam diximus, consociatio, aut subjectio, utilitatis alicujus causâ, cœpit institui. Deinde, et qui jura præscribunt aliis, in eo utilitatem aliquam spectare solent, aut debent. Sed sicut cujusque civitatis jura, utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes, aut plerasque, ex consensu, jura quædum nasci potuerunt; et nata, apparet, quæ utilitatem respicerent, non cœtuum singulorum, sed magnæ illius universitatis."

Thus, at the commencement of the 18th century, Groningius, in his work *De Juris Naturæ et Gentium Principiis*, published in 1705, depicted exactly the greatest happiness principle, involving the idea of number: "Supremæ autem rationis est, id agere, ut boni quam plurimum potest, et in quam plurimis obtineatur; et tantum diffundatur felicitas, quantum ratio rerum ferre potest." Lib. III. cap. xiii. § 12.

In the same way, Wolfius, in his *Institutiones Juris Naturæ et Gentium*, and Vattel, who adopts his principles in his *Questions du Droit Naturel*, both judge of human actions as good or bad, according to the influence they exercise over mankind, as tending to promote, or retard the perfection of the species, which is very nearly, in other words, the greatest happiness principle.

Burlamaqui, again, commences his *Treatise on Natural Law*, with the announcement of the design to inquire, what are the rules, which reason prescribes to men, for

attaining with certainty the end which they ought to propose, and which, in fact, they all propose to themselves, true and solid happiness. And no one has adhered more constantly to the principle of utility than Professor Pestel, in his *Fundamenta Jurisprudentiæ Naturalis*, translated into French, in 1775, and enlarged in a fourth edition, in 1788. This work, the author divides into two parts; in the first, he examines, what can render human life happy, and distinguishes two sorts of pleasures, the true and the salutary, the fallacious and the pernicious; in the second, he inquires, what are the natural laws which conduce to real happiness; and he considers the desire of happiness implanted in man, as expressive of the design and will of the Supreme Being. "Voluntas et fines Dei ex operibus divinis cognoscuntur: naturæ humanæ Deus insevit appetitum felicitatis; ergo noluit, ut ejus adeptio eidem naturæ repugnaret."

Finally, in the *Juris Publici Universalis Theoremata*, of Professor Lampredi, published in 1782, vol. I. p. 15, we find the following announcement of the greatest happiness principle: "Medium, ut aiunt, cognoscendi æquitatem legum, humanâ naturâ latissime sumptâ, cujus contemplatione, illud moralium omnium disciplinarum, inconcussum eruitur principium, ut quod et nostram, et generis humani felicitatem, promovet, bonum et justum sit, quod secus, malum et injustum."

From this historical deduction, abridged chiefly from the work of M. C. Comte, it is manifest, the merit of having originally discovered the principle of general utility, as applied to ethics and law, if it can be viewed as a discovery, cannot be attributed to any jurist or philosopher of the last or present century. Indeed, Mr Bentham, the great supporter of this principle, in its application to morals and legislation, candidly admits, that the idea was suggested to him by the works of Mr Hume.

Bentham's Works, vol. I. p. 268. But although Mr Bentham does not appear to have been the original discoverer of the principle of general utility, any more than Mr Hume, and although we consider the doctrine of the former, as well as of the latter philosopher, erroneous, and not supported by correct induction, in so far, as he confounds or denies the distinction between duty or obligation, and interest or inducement, and traces all the moral feelings and sentiments of mankind, to considerations of utility; we readily admit, on the other hand, the paramount, though not exclusive importance, of the principle of general utility or expediency, in all human establishments for the compulsory regulation of the conduct of mankind in their reciprocal intercourse. And we cordially concur with his warmest admirers in this country, and on the continent, in our acknowledgments of the very important services Mr Bentham has rendered to the species, in the cultivation of the science of law, not by discovering or establishing any new fundamental principle, but by his acute and exhaustive analysis of the elements of which the welfare of the individual and of the community is composed; by his accurate method of calculating the consequences, good or bad, resulting from particular actions, or laws and institutions; and by the successful application of this method to various branches of legislation.

As the result of our present inquiry, we have ascertained the principal distinctions and boundaries between ethics and law, between morality and legality; and have found, as the general fundamental principles of coercive law, justice, reciprocity in the actions of individuals, and general expediency or utility. But even supposing we shall have thus succeeded in exhausting the elementary and fundamental principles of coercive law, still, as we shall afterwards have occasion to observe, great difficulties remain to be encountered, in the practical

application of these principles to the regulation of the conduct of men, congregated in communities, in the limited circumstances, in point of subsistence, and the supply of animal wants, in which they are placed on this globe, and in the various changes in these circumstances, which take place in the progress of such communities in civilization.

CHAPTER IV.

WHETHER THERE EXISTS ANY JUS NATURÆ ET GENTIUM, OR NATURAL LAW IN THE SENSE OF THE JURISTS? —HOW FAR IS IT DISCOVERABLE?—TO WHAT EXTENT, IS THE STUDY OR CULTIVATION OF SUCH LAW, AVAILABLE FOR THE IMPROVEMENT OF THE POSITIVE LAWS OF STATES?

From the preceding investigation of the distinction between ethics and law, between morality and legality, and of the principles of justice, reciprocity, and general expediency, as the foundation of coercive law, we shall be enabled more clearly to ascertain, whether, and to what extent, there exists a *Jus naturæ et gentium*, such as the great majority of jurists have contemplated and described, as the source and basis of all positive law; or whether, from the great diversity of views and opinions, which we have seen to have been entertained by jurists, with regard to the foundation, the general principles, and the particular rules of the natural law, we are to conclude that no such law exists.

As we have already remarked at some length, most of the jurists of modern times, when they had exhausted their labours in the elucidation of the Roman law, and were led, by a comparison of the ancient and modern systems, to cultivate law as a science, appear to have borrowed, though in a materially different sense, the *Jus naturale et gentium* of the Roman lawyers; and thus introducing an alteration in the import and application of those Roman terms, which occasioned a good deal of confusion of

ideas, they appear also, in the cultivation of the modern *Jus naturæ et gentium*, to have adopted erroneous views, which were long, and very generally prevalent. Instead of viewing mankind, as they actually existed in society, on the face of this globe, they fancied, by abstraction, a state of nature, antecedent to the union of mankind in communities, and which never had any real existence. They then deduced certain rules, which appeared to arise from, or to be applicable to, this ideal state; giving these rules the appellation of the law of nature. And they next assumed these rules as a positive code; and proceeded to judge, according to this imaginary standard, of the actions and institutions of men, as united in civil society.

Such rules deduced from this imaginary state, different from the actual state, besides being deductions from limited experience, a defect, to which all the intellectual efforts of man are liable, had the still farther, but certainly avoidable, defect, of being founded on fiction. It is, therefore, not surprising, that the adoption of such rules should have led to many errors, and to many idle and unprofitable discussions, whether such actions were enjoined or prohibited, whether such institutions were sanctioned, or not, by this original law of nature. And in this sense of the term, the *Jus naturæ* appears to have been justly exploded, by the philosophic jurists of the present age, in Britain, not only by Bentham and his followers, but also by lawyers of more practical, if not sounder views; in Germany, not only by the philosophers Kant and Fichtè, but also by the very learned and able professors of law, Hugo and Savigny; and in France, by Charles Comte and Lerminier.

We have also seen, that the generality of modern jurists have erred, not only in directing their observation to an unreal state of humanity, but also in their mode of investigating the rules of the law of nature, so far

as deducible from the actual state of mankind on this terrestrial globe. Instead of attentively observing mankind, as individually constituted, in their relations to each other, and in the circumstances in which they are placed on earth, and drawing such conclusions as this observation might warrant, these jurists either held the maxims of the *Jus naturæ* to be innate or connate, and engraved on the hearts of all men; or if that doctrine did not appear quite tenable, or consistent with experience, they held these principles to be somehow cognoscible abstractly, *a priori*, and metaphysically determinable through the powers of the human mind; and when thus discovered or ascertained, or rather gratuitously and arbitrarily assumed, they held these abstract general principles, to embrace and infer, as necessary consequences, all the practical rules in detail, requisite for the regulation of the intercourse of men, whether as members of the same state, or as members of separate communities.

Into such a mode of investigation, *a priori*, modern jurists appear to have been led from various causes. It may partly perhaps have arisen from the habits of abstraction produced by the doctrines of the Aristotelian philosophy, previously so prevalent in the middle ages. It may have arisen partly perhaps from their having had transmitted to them in the *corpus juris* of the Romans, a general digested system of the rules of private law at least, which had grown up in the practical experience of a civilized and enlightened people. This habit of *a priori* reasoning may also perhaps have been increased, if not produced, partly by the greater facility of imagining abstract principles, and of adapting facts to these principles, than of carefully observing facts, and deducing the general conclusions they warrant; partly by the disposition to generalization, and simplicity of system, and partly by the pride of origi-

nality of thought, and intellectual dominion, which experience shows to be so alluring and attractive to superior minds. Lastly, this mode of investigation, *a priori*, seems also to have partly originated in the opinion of the greater certainty that attends mathematical truth, which is mere abstract consistency, than what is produced by the evidence of physical fact; as Wolfius appears to have thought, he could make the rules of the *Jus naturæ* more certain, by dressing them up in the garb of quasi-mathematical definitions and demonstrations. Whatever, however, may have been the causes of its adoption, the result of such a mode of investigation could not well be other, than the rather distressing diversity of opinion on this subject, which we formerly noticed.

But although jurists may thus have erred in searching *a priori* for a *Jus naturæ*, as the prototype in abstraction of all possible positive law, it by no means follows, as some of the older modern jurists, such as Hobbes, maintained, or as even Mr Bentham, and some eminent continental lawyers of the present day, appear to conclude, that such a *Jus naturæ* has no existence whatever.* Indeed, for a being of such very limited knowledge, as man, positively to deny the existence of relations among external objects, and events, as co-existent, or as consecutive and in succession, because these relations, or events, are not immediately perceived by him, is rather presumptuous, and at any rate unphilosophical. And the more scientific mode of proceeding seems to be, to ascertain, whether the laws of nature, in the limited sense of the jurists, although not intuitively perceived, may not be discovered by the same process of

* Traités de Legisl. Civ. et Pen. ch. xiii. § 10. Bentham's Works, Part II. p. 300, Part IX. p. 160. Themis, ou Bibliotheque du Jurisconsulte, Vol. IX. pp. 393, 394.

observation, experience, and induction, by which the laws of the material world, mineral, vegetable, and animal, have been discovered and classified, and the physical sciences, as they are usually called, so successfully cultivated.

Although, amid the great diversity of views and opinions, which we have seen to have prevailed among jurists, it is rather difficult to form a distinct or precise notion of what they denominated natural law, it is manifest, that in the sense in which they employed this term, it is confined to human actions. Now these actions, within the sphere of the powers delegated to men by their Creator, during their existence on this earth, may be viewed, either as other physical events of mind or matter, or as emanating from, and attributable to the individual agents.

In the former point of view, it is plain from experience, that all the events and changes in this terrestrial world, in which man is placed, as well as his own corporeal and mental frame, are regulated by certain physical laws; the same or similar causes uniformly producing the same, or similar effects; and the human mind being, by its construction, adapted to such a scene, by various dispositions and faculties, such as the instinctive belief, that the future course of events will resemble the past. It is also manifest from experience, that to the operation of these laws, men are in a great measure subjected; that over a great proportion of these external events, they have no control; and that even, where they have the power and choice of different modes of action, certain consequences inevitably follow the one course of action, or the other. Nor are such laws observable merely in the conduct of the individual; they regulate also the conduct of men associated in communities or states. They circumscribe, affect, and so far regulate, all the various institutions and establishments for the

government of nations, throughout all the stages of civil society, as Dr Adam Smith, in his *Inquiry into the Wealth of Nations*, and more recently M. J. B. Say, and M. Charles Comte, in their works on *Political Economy and Legislation*, have, in these departments, so ably demonstrated. And such laws might certainly, with great propriety, have been called the laws of nature; since their existence cannot be disputed, and they are obviously the basis of all human legislation.

But such are not the laws of nature, to which the inquiries of jurists have been directed in their treatises on the *Jus naturæ*, or which they had in view, as the model, and basis of all positive enactment. In these inquiries, jurists have contemplated human actions, chiefly under the second alternative aspect before noticed, as emanating from, and attributable to, individuals, either singly, or as united in families, communities, or nations. In this view, it is also manifest from experience, that, in this life, and in this terrestrial world, there are allotted and delegated to mankind a certain circumscribed sphere of voluntary action, and certain limited powers over external objects, organized or unorganized, animate or inanimate, and particularly over their fellow-men. In the performance or omission of these voluntary actions, as we had formerly occasion to observe, men may be influenced or regulated by their consciences, by their moral feelings or judgments of approbation or disapprobation, or by their veneration and regard for the will of the omnipotent and all-wise Creator, as directly revealed, or as inferred from his works in the creation and government of the universe. But though the moral and the religious sanctions have thus happily, beyond doubt, the most important influence, in directing the actions of individuals and communities to their true welfare, they have not, experience proves, been hitherto found sufficient for the regulation of human affairs during this

transitory life. And while the aid and co-operation of these sanctions, properly directed, are even in this present very imperfect state, highly salutary, and most desirable, it appears more correct, not to mix them up with, but to consider apart from them, the legal sanction strictly so called, or human compulsory law, so as to avoid the confusion of ideas, which jurists have occasioned by the introduction of these sanctions into their juridical treatises.

Confining, then, our inquiry into the existence of the *Jus naturæ*, to the rules of mere external legality, mankind in the exercise of the power of voluntary action, delegated by the Creator, not only find themselves restrained within certain limits, but learn by experience, that certain actions, or courses of action, or the omission of such actions, are uniformly attended with certain consequences to the individual agent, or to other individuals; in other words, that their power and range of voluntary action, is subject to certain laws, which they cannot infringe, or disobey with impunity. Certain consequences invariably and inevitably follow certain actions. No human power can change the nature of these consequences, or convert them, from hurtful into beneficial, or the reverse. What human actions are productive of good, or of evil, what are just or unjust, or what actions it is generally expedient, to enforce, or prohibit, are matters, obviously, independent of human power. And there thus manifestly may exist, and have existed, and do exist, relations between the human agent, and the action or event, and between the action or event, and other sentient and intelligent beings, not different in each particular case, but so common and general, as to be susceptible of arrangement into classes of cases, according as these actions are just, or unjust, or ought to be enforced, or prohibited. But it does not appear, that man is born with a knowledge of all these

general relations. It does not appear his Creator intended he should commence his career in this world, with what, we would call, in our imperfect language, abstract or general knowledge. It rather appears to have been the intention of the Creator, that he should come into this world, with dispositions and faculties, adapted certainly to the events, which therein take place, agreeably to pre-established laws, and so regulated, as to enable him to acquire by observation, individual or particular knowledge, and thereafter, in the course of his experience, to mark what is common to particular objects or events, to generalize, and to arrange, and classify.

Nor does this process in the acquisition of knowledge appear to be different, in reference to the physics of mind, from what it is in reference to the physics of matter, or to be different, in reference to the moral and legal sciences, of which the object is, what ought to be, from what it is in reference to the physical sciences of matter and of mind, of which the object is, what has been, what is, and what is to be. The moral sentiments of approbation or disapprobation, whether original or derivative, simple or compound, arise in the mind, agreeably to its constitution upon the contemplation of the individual human action. The immediate consequences of human actions, as hurtful, or beneficial, to the agent, or those in intercourse with him, are also almost immediately perceived. And the qualities, which are common to certain classes of these actions, are then remarked and distinguished, the benevolent from the malevolent, the just from the unjust, those which ought to be enforced, from those which ought to be prohibited.

This moral and legal classification of actions, too, obviously keeps pace, and advances, with the continuance of the race, and the progress of the nation, o[illegible]

the species. The attainments made by one generation, in this classification, are, by education, in the general sense of that term, by example and tradition, communicated to the next generation, without the necessity of going over, or repeating the same process. And the succeeding generation, starting from the point of generalization attained by the preceding, is enabled, not only to carry the process of generalization still farther, but to apply the principles discovered by the previous generalization, to new individual actions as they occur. In this way, both moralists and jurists appear to have been led to expect, that they might, *a priori*, discover complete systems of ethics and law, universally applicable. But this expectation they have not realized, and could not realize. For successful and useful generalization by man appears to be limited by the boundaries of the field of actual observation. And accordingly the details of what has been called the law of nature, as unfolded by Pufendorff, Cocceii, Wolfius, and other later jurists, are evidently little else, so far as they are susceptible of practical application, than a series of propositions, taken from the civil law of the Romans, stripped of all the particular provisions, and peculiar characteristics, which distinguished them, as part of, or as belonging to, the Roman system.

In short, the conclusion, to which we have come, is, that in the moral and legal sciences, as well as in the physical, the true mode of philosophizing is the inductive, proceeding from individual observation, to generalization, so far as warranted by that observation; and that most jurists have, therefore, erred, in searching *a priori* for a *jus naturæ*, as a prototype in abstraction of all possible positive law, instead of following the advice of Lord Bacon, and contemplating the various systems of laws, customs, and establishments, which have grown up in the course of time among different nations, seiz-

ing those common and general principles, which pervade all these systems, and then applying the principles, derived from, and ascertained by, experience, to the practical improvement of the institutions of particular countries. But, in this latter way, it is manifestly permitted to man, to discover a portion at least of these principles, or laws, or relations of legal right and wrong, applicable to the conduct of such beings, individually, when united in society; of which the existence cannot be denied, and which are so eloquently described by the Roman orator and philosopher:—"Erat enim ratio profecta a rerum naturâ; et ad rectè faciendum impellens, et a delicto avocans; quæ non tum denique incipit lex esse, cum scripta est, sed tum, cum orta est; orta autem simul est, cum mente divinâ."—*Cicero, De Legibus*, Lib. II. § 4.

To render the doctrine here maintained more perspicuous, a little farther illustration may perhaps be excused, at the risk of incurring the charge of repetition and prolixity. The chief, if not the sole objects of coercive law are obviously the external actions of men, in their reciprocal influences upon each other, with reference to their persons, or personal attributes, and with reference to the external substances and events, which exist, or occur, on the face of this earth, and which are necessary for, or subservient to, the subsistence, or supply of the animal wants, of the individual, and the continuation or propagation of the species, or are generally conducive to the welfare and happiness of mankind. Now, there can be no doubt, that in the nature of things, certain descriptions of these actions are just or generally expedient, and therefore ought to be commanded and enforced, and other descriptions or classes of actions are unjust or generally hurtful, and therefore ought to be prohibited and prevented by human power. And there thus exist, independently of human power, or in-

tion, certain laws of nature, according to which these actions ought to be so enforced, or prevented. It does not, indeed, appear to be given to man to perceive all these legal truths, and legal relations, *a priori*, or previously to experience, or even intuitively, so as to apply them with unerring accuracy to each particular case. There exists no code, or digest, of the law of nature, to the particular books, titles, or sections of which legislators or jurists can refer. But the book of nature has been opened to man by the all-wise Creator, in his works. In the constitution of man, corporeal and mental, in the conformation, and successive changes and events of the material world, in which he commences and terminates his mortal life, and with which he is, for a time, so intimately connected, in the events of the lives of individuals, and in the advancement or decline of men united in communities, all as made known to us by experience, by observation of the present state of matters, and by the records of former generations, and past ages, we distinctly perceive the existence and operation of certain laws, fixing limits which men cannot transgress with impunity, and indicating the courses of action, which the individual, or the community, may, for the general good, be compelled to pursue or observe, by the application of the physical force, which the Creator of mankind has placed at their disposal. Indeed, it is plain, that men must have felt the influence of, or rather their subjection to, such laws, before they could think of entering into conventions, or establishing with their fellow-men, common rules for the regulation of their conduct. The enactment of the legislature, or the sentence of the judge, if supported by the physical force of the united community, may make the general rule prescribed, or the particular question decided, the law of the particular nation. But no such enactment or judgment can render an action,

or course of action, conducive to the welfare of the individual, or of the community, which is in fact, in the nature of things the reverse, or innocent, which is in fact destructive of that welfare. "Omnium, quæ in hominum doctorum disputatione versantur, nihil est profecto præstabilius, quam plane intelligi, nos ad justitiam esse natos, neque opinione, sed naturâ, constitutum esse jus." *Cic. De Leg.* lib. I. § 10.

Nor are the general facts, or laws, thus discovered by experience, in the situation in which men are placed in relation to each other, with reference to the external world, in any degree imaginary, like the *Jus naturæ* founded on a fictitious state antecedent to the union of mankind in society. Such a state of nature, Condillac has truly remarked, is a mere abstraction, which exists only in our minds. But the legal relations between, or among individuals congregated into communities, with reference to each other, and to external objects, although perceived or contemplated, separately, or abstractly, or apart from the other attributes, or relations, of such individuals and things, have an existence, as real, as when they are declared, and enforced, frequently only partially and imperfectly, by the positive law of a state. Such legal truths, and relations, are not in any respect more unreal, than the laws which regulate the phenomena of the physical world. Like these, the laws which regulate the intercourse of men, with reference to each other, and the use of the physical objects of the external world, are perceived or discerned by observation and experience; and when observed, and recorded, or transmitted at least by oral tradition from generation to generation, form, as we shall afterwards have occasion to remark, more minutely, the only stable basis, and substance of all human jurisprudence and legislation.

Accordingly, if they have not altogether abandoned

the *a priori* investigation of the principles of law, or exactly adopted the views before explained, several recent eminent continental jurists have not only rejected as an authoritative standard, the *Jus naturæ* founded on an imaginary state of nature, but have, for the study of the *Jus naturæ*, as contained in the writings of Grotius, Pufendorff, Cocceii, and Wolff, substituted what they call the philosophy of law. The use of the term philosophy appears of late years to have become fashionable with metaphysicians, or cultivators of the intellectual sciences. Dugald Stewart entitled his great work, *Elements of the Philosophy of the Human Mind;* in Germany, Professor Hugo entitled his work on natural law, *Das Naturrecht, als eine Philosophie des Positiven Rechts;* and in France, while M. Cousin has followed Mr Stewart's example in the title of his *Cours de Philosophie*, the learned French lawyer, M. Lerminier, has designated one of his books as *Philosophie du Droit.*

To this use of the term philosophy, as combined with law, the chief, if not the only objection seems to be its vagueness and want of definite import. But this is a radical objection, to obviate which, it becomes necessary, in tracing the history of the science, to ascertain distinctly, what is meant by these terms, as denoting an important step in its progress. Law, whether ascertained *a priori* by the mere internal operations of the powers of the human mind, or *a posteriori* by observation and experience, is manifestly a species or department of human knowledge. But what is meant by philosophy? Sometimes philosophy seems to be used to express human knowledge itself, but arranged in a particular manner, or acquired according to a particular method. Sometimes it is used to denote a certain disposition, or natural talent, and culture of the mind, in contemplating, and arranging the objects of its know-

ledge. The philosophy of law may thus designate, either the aggregate of legal truths, known to men, as ascertained and arranged in a definite manner, or the talent, original, or acquired by culture, of ascertaining and arranging these truths in that manner. And the following, thus, seems to be the late improvement in the science, intended to be denoted by the terms, "Philosophy of Law," as distinct from the "*Jus Naturæ.*" The method, formerly adopted, was to deduce the rules of law in detail, from fictitious states of humanity, or from principles gratuitously or arbitrarily assumed, from partial and defective observation and induction, or by the mere force of imagination, without almost any observation at all; and frequently to array these principles, and deductions, in the shape of axioms, definitions, and propositions demonstrated with the apparent exactness of mathematical reasoning, as in the sciences of extension and number. The improved method, more lately proposed, is, to avoid all gratuitous or arbitrary assumptions, to commence with the study of positive laws, as matters of fact, as recorded or observed in practice, but not to confine the attention exclusively to the law established in any particular country; to investigate and compare the positive laws of different nations; to observe, in detail, the multifarious and varied descriptions of laws, actual and practicable; and to ascertain the grounds for preferring sometimes one arrangement, sometimes another, but always under the condition of being guided, in the determination to be adopted, no otherwise, than by fact and experience.

The authors, therefore, who use the phrase, "Philosophy of Law," appear to have intended to indicate by it, the science, or state of the science, to which they apply it, as conducted and cultivated according to the inductive mode of reasoning. And so far as the philo-

sophy of positive law indicates merely the state of the science of law, as ascertained by the inductive mode of reasoning, namely, the aggregate of those general and pervading principles, for the compulsory regulation of human conduct, which, in the experience of past and present generations, and in different countries, have been found to be most just and expedient among individuals and nations, in the circumstances in which they are placed on this globe, and under the events incident to their condition, the appellation appears to be sufficiently intelligible and well founded. If such be the distinct understanding, it signifies little whether the science, which consists in the ascertainment of these laws, be called *Jus naturæ et gentium*, or natural law, or in the phraseology of Professor Hugo, the philosophy of positive law.

But, by whatever appellation the science may be designated, its successful cultivation and progress, we have just seen, must depend very much on the mode in which the inquiries of jurists are conducted. It is easy to view man apart from society; it is easy to form general abstractions by a limited and partial observation of the state and condition of man, and it is perhaps not very difficult now, with the monuments we possess, of the legislative and judicial experience of ancient and of modern times, to construct systems, or digests of laws, very unexceptionable in details, and apparently applicable to any civilized community. And this has, in part, been repeatedly done, sometimes under the title of *Jus naturæ et gentium*, as by Pufendorff, Cocceii, Wolfius, and other jurists, sometimes with a view to particular countries as the codes framed under the direction of Charles V., Frederick, and Napoleon. But the details of the former description of codes are of value, merely, as exhibiting a sort of *beau ideal* of what a system of law might be; they cannot all at once be actually introduced *in cumulo*

among any people, and are, from their very generality, of little importance for effecting the practical improvement of the law of any country. For such a purpose, the previous and existing condition of each people must be carefully investigated, and ascertained; and its melioration is to be effected, not by transplanting into such a country the details of a code, however ostensibly complete, but by reviewing its previous particular institutions in detail, by applying to them, those not ultimate, but to a certain extent, general leading principles, which, as pointed out by lord Bacon, may be discovered by induction, to pervade the laws of all nations, and by bringing to bear upon them, that practical wisdom, which is the result only of enlarged and enlightened experience. When such leading principles can be applied, systematic theories of law, which have been usually exhibited by their authors as complete and perfect, may be dispensed with, as unnecessary for practical use.

From these considerations, and from the conclusions to which we were formerly led, with regard to the ultimate fundamental principles of law, or legality, as distinct from ethics, or morality, there seems to be no solid ground for the warfare, which appears for some time to have been carried on, between the two rival scientific schools of law, into which Europe seems now to be divided, or as they have been designated, the historical, and the analytical school.* Instead of finding the principles of the two rival schools inconsistent with, or opposed to each other, we anticipate a beneficial result from the combination of the historical and analytical methods of investigation. And it rather appears, the science and the art of law will both be more effectually promoted by merging this warfare in an energetic co-operation of the two schools by a wise eclecticism,

* See the learned and ingenious treatise of M. Rossi, *De l'Etude du Droit*, 1820.

which, avoiding the extremes, to which both schools have pushed their respective principles, (an error so incident to men of genius,) shall combine the learning and talent of both in discovering, what is most just and expedient in law, and what is still more difficult, in devising the means by which the rules, so discovered and ascertained, may be introduced and established in practice. Such, unquestionably, are, or ought to be the two grand objects, both of the historical, and of the analytical schools of law. And the difference between them will, in reality, be found to consist, not in their objects, but in the means, by which these objects are to be attained.

Thus the leaders of the historical school maintain, that the law of a nation is never the product of the arbitrary will of a legislator, but the necessary result of the circumstances in which it has been placed, and of the antecedent events in its history; and that, therefore, to ascertain the actual state of a people, with reference to the laws, which it enjoys, or is capable of enjoying, it is necessary to become acquainted with the different successive states, through which it has passed. And, doubtless, it is historically true, that by far the greatest part of the laws of a people, are not the arbitrary commands of any power in the state, whether consisting of one, a few, or many individuals, but have grown up, almost insensibly, with the people, have been adopted from time to time to satisfy wants, to protect weakness, to gratify or restrain the various feelings of which man is susceptible, and are, in reality, the habits, customs, and modes of action of the great body of individuals composing the nation. It is equally true, that it is extremely difficult, if not altogether impracticable, for any legislature, whether consisting of one, a few, or many individuals, to promote or secure the welfare of a people by any sudden and sweeping changes in its system of laws;

and that there is great risk of doing mischief by such changes, from its being almost impossible to ascertain all the causes which influence their physical and moral condition. But while it is thus conceded to the historical school, that with a view to effecting salutary changes, and real meliorations in the laws of a people, a profound knowledge of their history, of the physical, moral, religious, and legal, or juridical states through which they have passed, is an indispensable requisite, the leaders of that school ought, at the same time, to have distinctly admitted, that such profound knowledge of the actual and previous states of a people, can only be turned to practical account, and made beneficial by its combination with a philosophical analysis of the principles of the human constitution, as exhibited in the intercourse of mankind as divided into, and united in separate communities or states; and that the improvement of law, which arises naturally, and almost necessarily from the education or instruction which each generation imparts to its successor, may be greatly accelerated by the exertions of a wise and enlightened government, in gradually adapting the laws, which have come to be established, to the changes which may have taken place, in the circumstances, views, and feelings of the nation; in abrogating rules and usages, which are no longer necessary or useful; in shortening cumbrous processes in the law, and in simplifying and scientifically arranging the system.

On the other hand, the jurists of the analytical school, while they have, in reality, not done much towards the promotion of the science of law, by the mere enunciation of the proposition, that general utility, or the greatest happiness principle, is the foundation of law,—a proposition known and admitted since the days of Plato and Aristotle,—appear rather to overrate the advantages of their mode of philosophizing. They seem to despise the instruction to be derived by the legislator from

the experience of past ages, as recorded in history. In their excessive generalization, as remarked by M. Savigny and M. Comte, they divest law of its actual, individual, or particular character, of its national originality, and appear to consider it as composed of inflexible abstractions, like the mathematical sciences. They neglect those views of the historical school, with reference to the previous, and present, states of a people, which are indispensably necessary, to secure the introduction, and salutary establishment of any system of laws, however metaphysically complete it may be otherwise, or perfect in itself. Indeed they seem to consider the legislator too much, as a separate and distinct being from the people, for whom he legislates—as an autocrat of a higher order, issuing his mandates to an inferior class of beings; forgetful, that without adapting his regulations to, and founding them upon, the previous and existing state of the people, the legislator is powerless to any beneficial effect.

CHAPTER V.

OF THE PRIMARY DIVISIONS OF COERCIVE LAW, INTO NATIONAL AND INTERNATIONAL, AND OF NATIONAL INTO PRIVATE, AND PUBLIC, OR CONSTITUTIONAL LAW.

HAVING thus inquired how coercive law has been cultivated, and may, or ought to be cultivated, as a science, and endeavoured to ascertain the sphere of its operation, as distinct from ethics, and the general principles on which it is founded, we now proceed to inquire, what are the primary or grand divisions—and what the various subordinate branches or departments, of which coercive law consists, as applicable to the different conditions and relations of men in society, whether as members of the same community, or as forming separate and independent states—what are the distinctions and limits of these grand divisions, and of these subordinate departments of law—what the elements of their coercive force or sanction—what their origin, and establishment among nations?

Without repeating the now rather hackneyed accounts of the origin of civil society, we may with safety assume, as the clear result of historical induction, that the weakness and the wants of individual man, the necessity of union for bodily defence and protection, the necessity of joint exertion and labour for procuring subsistence, the mode provided by the Creator for the continuation and propagation of the species, the selfish desire of enjoyment, the domestic affections, parental and filial, the

benevolent and social affections, have all concurred and conspired to induce and force mankind to associate themselves into communities; that man's natural state is not apart from his fellow-men; that he is never found out of society; and that, in his destiny upon earth, his progress from a comparatively rude, to a comparatively civilized state, is equally natural, as what has been called his primitive condition.

It may also be assumed, as an historical fact, that the physical division of the globe, on which mankind are born and die, into different portions, by mountains, rivers, and seas, as well as the limited corporeal and mental powers of men, and perhaps also the difference in their races, and languages, have prevented, and will in all probability prevent the actual union of mankind into one great universal society, and have led them to associate themselves into separate communities or states, families into tribes, and tribes into nations, comparatively unconnected with, and independent of each other. Indeed this seems, in his wise providence, to have been the design of the omnipotent Creator. And in this way arises what we may consider as the first division of coercive law.

Law, National and International.

For law may be viewed, first, as applicable to, and as established among the individuals composing the same community, state, or nation, with reference to each other, as living in the same society, and under the same government; or secondly, as applicable to, and established among the different communities, states, or nations, into which mankind are congregated in the different regions of this globe, with regard to their reciprocal intercourse as independent states and governments, or as individual members of such separate states.

For the first of these two divisions or departments of law, we have not in English any very precise and appropriate general appellation. The term municipal, adopted by Judge Blackstone, and *le Droit de Citè* of Lepage, are obviously too limited, being usually applicable, chiefly, if not entirely, to the smaller internal communities, of which a nation is composed. The term "civil" is equally inappropriate; partly because among modern, especially Continental jurists, the civil law is used to denote the Roman law, partly because in this country, civil law has come to be used in a limited sense, as opposed to criminal or penal law. As little does the division of the Roman lawyers correctly mark this distinction. For while the former department of law is correctly enough described by Gaius, in these terms, "Quod quisque populus ipse sibi jus constituit, id ipsius proprium est, vocaturque jus civile, quasi, jus proprium ipsius civitatis," his description of the *Jus Gentium*, viz. "Quod naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur," obviously implies, not the law of the external relations and intercourse of independent states, but that department of the internal law of states, which has been recognised in common by most nations, from the similarity in the constitutions, corporeal and mental, of human beings, and from the similarity in the circumstances in which they are placed, both leading to the adoption of similar usages and rules of conduct.

International Law.

The first modern jurist who attempted a more discriminative expression for the two grand divisions of law we are now considering, seems to have been Dr Richard Zouch, of Oxford, who in 1650, published his work en-

titled, *Juris et Judicii Fecialis, sive Juris inter Gentes, et Quæstionum de eodem, Explicatio;* thus distinguishing *jus inter gentes* from the Roman *jus gentium.* Chancellor D'Aguesseau (1757) next marked the distinction in the following passage. "Que me reste t-il, apres avoir eclairci toutes mes idées sur ce point, si ce n'est, d'en tirer des consequences generales, qui renferment tout ce qui est essentiel au Droit des Gens, soit par rapport a la conduite, que les nations doivent suivre, les unes a l' egard des autres, soit par rapport aux Regles, que chaque nation a interet d' observer, dans sa sphere particuliere, et ne considerant, que les peuples, qui y sont compris? Je commence par les premieres, qu' on pouvoit appeller, le Droit, qui doit s' observer, entre les Nations, ou Jus inter Gentes, par une expression plus propre, et plus exacte, que le terme general, de Droit de Nations, ou de Jus Gentium, terme, qui peut avoir, un autre sens."* And more lately, Mr Bentham, taking the same more accurate view, but without being aware at the time of the passage just quoted, introduced the term "international," which appears to have come into general use, not only in this country, but on the Continent.

We may, therefore, more distinctly express this primary division of law into its two most general branches, by the appellations of national law, the internal law of a state, or the law of the relations to each other, of the members of whom a state is composed; and international law, or the law of the external relations of states, *jus civitatum inter se.* And these external relations, it is manifest, may exist, either between the states, considered as bodies politic or corporate, or legal personages, namely, between the sovereigns or governments of these states, or between the individual members of these different nations, in their reciprocal intercourse; a distinc-

* Meditat. sur l' Origine de Justice, 1780, Med. X. vol. IV. pp. 214, 215.

tion, which we may have occasion to unfold and follow out more minutely, when we consider the different branches of international law.

To the actions and conduct of mankind, as thus associated and congregated into separate independent states, the rules of morality or ethics, appear, and have generally been held to be equally applicable, as the rules of compulsory law. And it is rather singular, that the opposite doctrine should be maintained in one of the latest treatises on diplomacy, *Un Traité Complet de Diplomatie, par un ancien Ministre;* 1833. That anonymous author observes, "On ne savoit attribuer à des peuples, à des personnes morales, dont l' existence ne repose, que sur les actions exterieures, un esprit et des sentimens interieures, tels, qu' on les attribue à un individu. Un devoir moral, qui ne peut etre violè, ou rempli, que dans l' interieur de notre ame, n' existe donc pas pour eux." But even according to this doctrine, the rules of morality, or ethics, are applicable to the individuals of one independent state, in relation to the individuals of another independent state; and although the individual members of a state, who may have no control over the acts of its government, may not, in a moral point of view, be responsible for the acts of that government, it seems manifest, that the conduct of a number of men acting jointly, or in union, is equally susceptible of moral approbation or disapprobation, as if they acted singly and separately; and that the conduct of nations and governments, in relation to other nations and governments, may correctly be denominated, equitable, disinterested, generous, or the reverse, as well as legal, or illegal.

In our present investigations, however, our inquiries are limited to law strictly so called, to compulsory or coercive law, whether the internal law of a nation, or international; to the legality or illegality of the external

actions of individuals, or nations, with a view to coercion by human force. And that there exist between and among the assemblages or societies of men, called nations, as well as among individuals of the same nation, certain legal relations, distinct from moral relations; that there are certain classes of actions, or proceedings, which it is felt to be just, and found and held to be generally expedient, that nations should have the power of preventing or enforcing against each other, by such means, as the Author of nature has placed at their disposal, there appears to be no room for doubt. But in this respect, there is a manifest and striking distinction between the two divisions of law we are considering, in the mode in which, and in the extent to which, they may be enforced. In the former, as we shall immediately see in detail, the force of the united community overpowers and controls the individual. In the latter, as we may afterwards see, in subsequent separate inquiries, the means of compulsion are limited to the force of one nation directed against another, and to the union of several nations against one or more other nations, for the maintenance of their common independence, and reciprocal liberty of action, consistently with the uniform and indiscriminate application of the same general rule to all.

National Law, or the Internal Law of a State.

In observing mankind as living together in civil society, we may view them, either in their united, collective, or corporate capacity, as a whole, in relation to the individuals, of whom the nation is composed, and *vice versâ*, in their single and separate capacity, as so many individuals in relation to each other. In the former view, they are what is called the state and government; and the rules of action enforced under the social union, and which are to be observed by the state towards the indi-

viduals composing the nation, by these individuals towards the state, and by the different members of the government towards each other, form what has been called public law, sometimes political law, and may be more definitely designated constitutional and administrative law; since, in the observance of these rules, the constitution of the state consists, and the government of the nation is administered. In the latter view, the rules of action enforced under the social union, and which are to be observed by the different individuals composing the nation towards each other, in their reciprocal intercourse, form what has been called private law, or jurisprudence.

National Law, Private and Public.

That there is a foundation in nature for distinguishing the internal law of a nation, into these two branches or departments, is abundantly obvious. But these departments are most intimately connected; and it is frequently difficult to mark the boundaries between them. They are both dependent upon, and derive their efficacy from, the social union, so far as realized in practice. Both have their origin and progress in the corporeal and mental constitution of men, and in the circumstances in which they are placed on this globe; and both grow up, from the operations of these causes, to a considerable degree of maturity, without much foresight, or pre-arranged or preconcerted plans. Indeed the chief, though by no means the sole, or exclusive object of public or constitutional law, is the establishment and maintenance of a good system of private law. "Jus privatum," says Lord Bacon, "sub tutelâ juris publici latet." While, therefore, with a view to more accurate observation, it is proper to discriminate and consider apart, and in succession, these two kindred departments of this important science, we shall find it impracticable to preserve a complete separa-

tion, and will be unavoidably led, on many occasions, to mark their reciprocal influence and mutual dependence.

The leading divisions, and subordinate branches or departments of public law, may perhaps form the subject of subsequent inquiries. At present we proceed with the doctrines of private law.

CHAPTER VI.

OF THE INTERNAL AND PRIVATE LAW OF A STATE, OR JURISPRUDENCE, COMPREHENDING THE DOCTRINES OF THE RIGHTS AND OBLIGATIONS OF THE INDIVIDUALS COMPOSING A PEOPLE, IN RELATION TO EACH OTHER—OF THE PRIMARY DIVISIONS OF PRIVATE LAW INTO COMMON OR CONSUETUDINARY, AND STATUTORY; INTO CIVIL, AND CRIMINAL OR PENAL.

THE external actions of mankind, as distinct from their internal sensations, perceptions, judgments, and other merely mental operations, form, we have seen, the proper province, or sphere of coercive or positive law; and appear to be the only actions, which that law ought to attempt to control, or can at all, efficiently, or beneficially, regulate. And the external actions of human beings, living on the surface of this terrestrial globe, and having intercourse with each other, become the subject of coercive law, only so far as they affect, or have an influence upon other individuals, either directly with reference to the persons, the corporeal and mental frame or constitution of those individuals, or indirectly with reference to other external physical objects and events.

Each human individual has obviously the power of voluntary action, and of making exertions in the external world, for the preservation of his existence, and the promotion of his welfare and happiness. He has obviously assigned him by the Author of nature, a certain limited sphere of action, within which he has physical power. And were a single individual man to exist

alone on any portion of the earth, there would be no other, than this physical limit, of his power of action in relation to the external world. But man has not been found to exist alone. He is born, and lives in society, with his fellows, as his natural element. From his birth, and life in society, there necessarily arises a limitation of the physical power of voluntary action of each individual, to what is consistent with every other individual, having the same power of voluntary action. And this limitation of the range of the voluntary actions of individuals, so as not to interfere with the range of the voluntary actions of other individuals, agreeably to a general rule of reciprocity, appears, independently of positive institution, to constitute legality, or justice in a strict sense, as predicated, not of the motives, views, and feelings, but of the external conduct of mankind. Nor is this limitation of the voluntary action of individuals resulting from the birth and life of man in society, applicable only directly with reference to the persons of others, it exists also in relation to other individuals, indirectly, with reference to other external objects and events, including various terrestrial substances, the lower animals, vegetables, and minerals, as affording subsistence, as supplying the wants of man's animal nature, and as adapted and subservient to the gratification of his corporeal instincts and mental desires. Over these other external objects and events, man is, by his Creator, invested with certain limited powers of modification, and adaptation to his use and enjoyment. Some of these external substances are supplied by nature, in such abundance, and to such an extent, as to admit of use by all mankind, without the use taken by one being destructive of, or inconsistent with, the use taken by other individuals. And so far, there is no room for collision or competition. But most external things which are immediately requisite for the subsistence,

cover, and shelter, and subservient to the use and enjoyment of mankind, do not physically admit of any such unlimited participation in common. The natural fruits of the earth, in its uncultivated state, and the lower animals in their wild condition, afford but a scanty subsistence to man, who is evidently destined to earn his livelihood by the sweat of his brow. The earth must be cultivated to produce vegetable food in abundance. Certain descriptions of the lower animals must be tamed, domesticated, and supplied with vegetable nourishment, to render them wholesome food, or to obtain the benefit of their progeny or produce. Certain minerals, vegetables, and parts of animals, require the labour of man to adapt them to the important purposes of clothing and shelter, and to the various other uses and conveniences of life. Particular connexions are thus formed, not only between certain aggregate numbers of men, and that part of the surface of the globe, which they collectively occupy or inhabit, but also between particular individuals of the same tribe or nation, and particular parts of its portion of the globe, or territory, and the particular external moveable substances, which they may have first seized, or gathered, or reared, or produced from the earth by their labours, or by their separate skill and industry, rendered more fit for human use and enjoyment.

From the very existence, then, of mankind in society, from the produce of the earth physically requisite for their subsistence or comfort, not admitting of participation in common, or not being produced in such abundance, as to afford the desired proportion to all the individuals living in the same circumscribed district, from the labour and skill of man being requisite to render the earth more productive, and to adapt its produce to his use, and from the connexion thereby formed by individuals with particular parts of the earth, and par-

ticular moveable substances, there arises a collision of the spheres of action of individuals, with those of other individuals, in relation both to the persons of individuals, and to external things, and a consequent apparent opposition of interests, claims disputed, undertakings not fulfilled, competitions and aggressions.

Were all the individuals living together in society, disposed at all times to follow the dictates of a pure and elevated morality, or were they sufficiently enlightened to take a comprehensive view of their own real interests, and to be convinced that the welfare of the individual, and of the community are indissolubly connected; apparently opposing interests might then, no doubt, be reconciled, and good will and harmony maintained without the intervention of human compulsory law. But experience unhappily proves, that this has not been the conduct of mankind in general, in any age, or in any portion of this globe. And the question comes to be, by what coercive power are these competitions and disputed claims to be determined and enforced, and these aggressions to be repressed? And by what rules is the exercise of that coercive power to be regulated?

Section First.

Of the Origin and Foundation of the Coercive Power of a Community or State, in Private Law.

For the creation of such a coercive power, and the establishment of such regulations, as we have just found to be indispensable, there is no occasion to resort, like Rousseau, and many other philosophers and jurists, to supposed conventions and contracts, to the hypothesis of a formal social compact, by which, it is conjectured, men agreed to pass from a state of nature, and to adopt all the limitations of physical liberty, which exist in civil

society. Such a state of nature, antecedent to civil society, is, we have seen, a mere fiction. No evidence exists of any such original compact having ever been entered into by any people. Besides being, in the literal sense, highly improbable, if not impracticable, such a contract by one generation could not, of itself alone, bind succeeding generations; and even the obligation itself to fulfil a contract, obviously rests on the more general principle, of the observance of such contracts among individuals being requisite for the general interests of mankind.

But without any such fictitious compacts, the origin of the coercive power and regulations, now under consideration, may be satisfactorily traced in the constitutions and conditions of men, as congregated on this globe. In the provisions made by nature for the continuance and propagation of the human species, by a succession of individuals, each destined to commence, pass through, and terminate a limited earthly career, in the distinction of the sexes, in the relation of parent and child, in the progress from infancy to manhood, and old age, we find the rudiments of authority and coercive law. Besides the influence of the natural attachment of kindred, and the general benevolent and social affections, men are irresistibly led to unite, and to act in concert, especially in the ruder periods of society, not merely for their self-defence against other tribes, but for obtaining the means of their subsistence, and for the promotion of their common welfare. These united efforts are required to protect them against the attacks of the lower animals, and to secure the hazardous produce of the chace. These united efforts are necessary to enable them to cultivate the earth with success. In the exercise of these united efforts, in which union the strength of the human species mainly consists, the proper guidance and direction of the individuals thus acting in concert, is

indispensable for the attainment of the objects they have in view. The choice of such leaders or directors may depend partly upon the affections of family or kindred, partly upon superior corporeal strength and agility, but chiefly upon superior mental powers and experience. In this way families increase and multiply, and grow into tribes, and tribes coalesce into nations, from considerations of mutual benefit, or are frequently forced into such union by external conquest. In this progress, the relations of family and kindred require little regulation, beyond what arises from the influence of natural feeling. The soil of the territory of the tribe is gradually allocated among the individuals, who have first occupied it, or acquired it by conquest, or by whose joint effort it has been cultivated and rendered productive. The moveable products of the earth are divided among those who have first discovered or seized them, or produced them, or adapted them to human use by their skill and industry. And from this division of things, moveable or immoveable, among individuals, arise contracts, by which these things are exchanged, or transferred for equivalents, or let to use, and individuals assist each other, by rendering personal services in return for their subsistence, or other valuable considerations.

All this appears to proceed in society, without almost any foresight on the part of individuals, or any preconcerted legislation. And in this progressive state of matters, the great bulk of the people acquiesce from generation to generation, and customs grow into rules, or are established as law. But among all nations hitherto, a portion of the population have always been disposed, from ignorance of their real interests, from selfish motives, or from violent and malevolent passions, not to rest contented with the order of things resulting from the corporeal and mental constitution of mankind, and from the circumstances in which they are placed,

but to assail the persons, or seize the possessions of their neighbours, or to withhold fulfilment of their own promises and engagements. Among all nations, likewise, in the progress of the allotment and cultivation of the soil, and of the distribution of things moveable, in the claims of kindred, and in the multifarious transactions of life among individuals, doubtful questions have always arisen, requiring for their determination the exercise of the human intellect. And to prevent and restrain these aggressions, and to decide these questions, recourse behoved to be had to a power, combining both the intelligence and the physical force necessary for the purpose.

The requisite general force is obviously to be found in the union of the physical strength of each individual to defend and protect himself, to preserve his acquisitions, and to promote his own welfare. And although the necessity for compulsory human law, presupposes that conscience or moral feeling has so far ceased to influence, there are various feelings, views, and considerations, of individual or family interest, which exist not merely at one time, or in one place, but in all individuals, and in all successive generations, and which operate in all ages, the establishment, and the continued maintenance of a public compulsory power. In particular, independently of, or apart from, moral feeling properly so called, there exists in every human being an instinctive feeling of resentment against the aggressor who assails the person, or converts to his own use the acquisitions of another, whether that other be one of his own kindred, a neighbour, or a fellow-countryman. And although the excessive indulgence of this feeling by legislative bodies may have contributed to render criminal codes more severe, than they ought to have been, and ought by no means to regulate the penal legislation of an enlightened people, its influence in support of public authority, as

exercised for the protection of individuals, has been highly salutary in the early periods of society, and continues so at the present day.

In the great majority of cases arising among individuals of the same family, community or nation, the better feelings of our nature, if not the positive virtues of benevolence and beneficence, at least the negative virtue of justice, so far as regards external actions, are predominant; and the application of external force is unnecessary. Experience, however, exhibits a melancholy minority of exceptions from the general fact. But where moral feelings thus fail to influence, and individuals cannot place confidence in other individuals, as to the rectitude of their conduct, selfish views and considerations come in aid, and so far supply the place of morality. His own preservation and general welfare, are the legitimate objects of every individual. Where these objects cannot be attained by his own individual power, or by union with those, with whom he is more immediately connected, he must have recourse to the aid of the other members of the community; and this aid, he has little difficulty in finding, because those others have precisely the same object in view, because all the members of the community have so far a common interest, their protection from violence or aggression. Each individual finds, or at least the great majority of the individuals living together in a tribe or nation, in social intercourse, in any definite portion of the globe, find, that to obtain their own individual security, they must each assist, and contribute to the maintenance of the security of the other members of the community,—that the security of each is bound up in, and inseparably connected with, the security of all.

Nor does the operation of the motives, or causes, thus cursorily referred to, as necessarily leading to the establishment of a coercive power, require the ceremony, or

celebration of any formal act, devolving the physical force of each individual, upon the individuals intrusted with the charge of protecting the members of the community against injury from each other. And accordingly, there is no historical record of such formal delegation or surrender of physical power by the many to the few, except when individuals emigrate from a civilized state, and establish themselves in a new country. As long as the individual commits no aggression or offence against others, it is to be presumed, since each individual can be judged of only by his actions, that he concurs in the preservation of the general security, and that his individual force belongs to the community or state. Every individual, even when he begins to contemplate or plan in his mind an aggression against his neighbour, necessarily continues to dread the power of all the other members, just as all these others dread his power being exerted on behalf of the community, from their ignorance of his evil intentions, until disclosed by his actions. When aggressions are committed by one individual, or by a few individuals acting in concert, all the other individuals composing the society are irresistibly impressed with the conviction, that, if the oppressive or injurious treatment of any one member of the community be permitted, their subjection individually to similar treatment will in all probability be the consequence. The power of all thus comes to be exerted for the common safety, and protection of all, and restrains the power of each individual within its proper limits.

In short, the supposition of a formally concluded contract among all the individuals of a tribe or nation, in order to found the exercise of the coercive power of the community, for the protection of the members of which it is composed, is as unnecessary, as the supposition of a contract to found the reciprocal obligations of parents and children. The social union is the natural condition

of mankind; and a people, or nation, as a number of human beings, connected and continued by the intercourse of sex, and congregated and living together, in a particular portion of this earth, for their mutual preservation and welfare, has been compared, and may be correctly enough compared, to an organized natural production, containing in its structure, the elements of its internal government and regulation, as well as of its duration and advancement.

Section Second.

Of the Sources, Growth, and Accumulation of Private Law—Of its Division into Common or Consuetudinary, and Statutory.

Such being historically the origin, and philosophically the foundation of the coercive power, exercised by communities for the protection of the individuals, of whom they are composed, in their intercourse with each other, the other branch of the inquiry is, by whom, and according to what regulations, is this power to be exercised? A blind fortuitous mechanical power, dependent on chance, namely, the operation of causes, which man can neither foresee, nor control, would not attain or accomplish the end, for which the power is delegated, or rather naturally arises from the congregation of mankind. It must be exercised with intelligence and impartiality. It is utterly impracticable for the whole people, in its collective capacity, to exercise such a power in each particular case. The requisite impartiality, in the exercise of the power, excludes not only the aggressor, but the injured party, and the persons immediately connected with either. In early times, the military leaders, or civil rulers of a people, take little charge of the private affairs of individuals. When might ceases to prevail

over right, the private disputes of individuals appear at first to be determined by arbiters, chosen by the parties themselves. But as a people advances in civilization, the state, or collective power of the community, is resorted to, as the only impartial third party, possessing the requisite compulsory force.

At present, under the primary division of the internal law of a nation, into private, and public, a separation necessary to be observed for distinct consideration, we are, in the department of private law, examining merely the relations of individuals, living together in the social state, to each other, without reference to the community as a whole. And the chief purposes, for which, in this view, the interposition of the power of the community is required, are, to deter, and prevent individuals from aggressions upon other individuals,—to redress wrongs, or enforce reparation for aggressions or injuries,—to determine disputes among individuals occurring in the intercourse of life,—to enforce obligations arising from the relative situations of individuals, or from their voluntary acts or undertakings. For the most necessary of these purposes, the ordinary intelligence and feeling of the community, are generally found sufficient in a rude state. There is little or no occasion for the community interfering beforehand, or promulgating general rules, which are already familiar to every one. According to these obvious rules and customs, injuries are redressed, particular claims and disputes, are decided individually, as they occur. And in this way, in private law, the exercise of the judicial power, especially in the penal department, appears historically to have preceded the exercise of the legislative power. But in the progress of society, the power of the community is required, and proceeds to prescribe general rules, not only for the public government of the nation, but for the private conduct of the individuals of whom it consists. And

there is thus so far involved in the doctrines of private law, the consideration, not only of the judicial power, and of the executive, or administrative, so far as subservient to the judicial power, but also of the legislative power of the state. And, on the other hand, while the legislative and judicial executive powers of the state, prescribe, determine, and enforce, the obligations of individuals to each other, the machinery of the judicial executive power, determines also, and enforces, the obligations of individuals to the state, and of the state to individuals, whether expressly prescribed or enacted by the legislative power, or which have grown up from custom, and become constitutional law, or the fundamental law of the state.

In this way private and public law are so intimately connected, and run so much into each other, that, whichever of the two be considered first, it is necessary to anticipate, to a certain extent, some branches of the proper doctrine of the other. And before proceeding, therefore, with any attempt to ascertain and classify the rules of private law, we shall so far anticipate the doctrines of public law, as shortly to consider, the legislative, and the judicial power of a state, and also the executive or administrative power, for carrying into execution, or enforcing, the enactments and determinations of these two powers, inasmuch, as they are the sources of private law.

The coercive power of the community, it is plain, may be exercised, either in prescribing general rules for the future conduct of its members, or in issuing individual orders or commands, applicable to particular cases. And as the excellence, if not the essence, of law, consists in the rule being common and applicable to classes of human actions, so as to admit of its being known beforehand, and of its uniform enforcement for the behoof of, or against individuals, generally, the great object in private

law, is, the establishment of such general rules, as may be requisite for the compulsory direction of the members of the community, in their intercourse with each other.

But the history of all nations, which have made any advancement in civilization, shows, that only a small part of such general rules in private law, have been established, *a priori*, by the direct and positive statutory acts of what is called the legislative power of the state. In their domestic, and in their other intercourse in life, with a view to their subsistence, their shelter, their clothing, and the gratification generally of their corporeal and mental wants and desires, the inhabitants of a particular portion of the earth, congregated into a nation, from their common and similar constitution, and situation, and from the influence of example, and disposition to mutual imitation, adopt and follow, similar modes of action, habits, or customs. And by far the greatest portion of the private law of a nation, thus grows up, almost insensibly, without any minute previous investigation, and without any act of the legislature, or interference of the combined coercive power of the community. No positive act of any human legislature is necessary, to prescribe generally the duties of husbands and wives, parents and children, the reparation of personal injuries, or damage, the establishment and protection of the right of property in external substances, or the binding nature of contracts. And there thus arise, and come to be recognised by all its members, a great number of rules of action, equally obligatory on the individual, as the rules directly prescribed by the united power of the community, but independently of the exertion of any such power. "Les codes des peuples se font avec le tems; mais proprement en ne les fait pas."—*Discus. sur le Projet de Code Civil.*

With reference to its sources, private law thus comes to be distinguished into the collection of general rules

for the conduct of individuals prescribed or enacted by the supreme power of the state, usually called *lex scripta, leges*, or statute law; and the collection of rules recognised by the members of the community, without any positive interference, or express act, of the legislative power of the state establishing these rules, or what is called common or consuetudinary law, *Consuetudo, mores majorum.*

But the historical growth of the common law requires a more full illustration; and the views of the German historical school appear, in this department, to be well founded, and highly valuable. In the infancy of nations, judging from the history of past ages, and from recent observation, the common law exists merely in the ordinary modes of action, habits, and customs of the people as resulting from the similar mental and corporeal constitution of the individuals composing the community, and from the external circumstances in which they are placed, and as gradually extended and unfolded from generation to generation, in the course of the natural advancement, consequent upon the continued association of individuals in one community, forming, as it were, an organic body. In its origin, the common law is not forced upon the people, or even received by the people from any external power; it is rather created by, or arises out of the union and intercourse of the people. It does not, as observed by Savigny, exist of itself, like an insulated and independent machine, placed by its inventors in the midst of the nation, and which may be constructed in one way, rather than another. It comes in time to be embodied in the national language, and transmitted from generation to generation by oral tradition. It then exhibits itself in the external formalities of transactions. And in this way, the leading doctrines of property or the right to the exclusive use and disposal of external things, of the binding nature of

contracts, and of the rights of family, kindred and succession, come to be recognised, and acted upon without any interposition of the sovereign or legislative power of the state. Legislators do not create these legal relations. They have an existence in nature anterior to, and independent of, legislative enactment. The aid of government is merely required, to declare, protect, and enforce them.

In the early periods of the formation of states and governments, the private rights and obligations of individuals are very seldom, scarcely ever defined, in written laws, established either by the military leaders in war, or by the civil rulers in peace. It does not in these times occur to any one, that such private matters, fall under the particular care of the supreme power, which, in public matters, governs the community. Where disputes arise among the inhabitants, they are frequently at first determined by force; and, subsequently, when society has made some advances, they are decided by arbiters chosen by the contending parties themselves, and upon the footing of these arbiters having special regard to the rules expressed by the community itself in its habits and customs. In these circumstances, it gradually becomes more and more necessary, that private individuals should in their actions, conform to the fixed and permanent usages of the community. And these customs, after they have for a time regulated the awards of arbiters, and subsequently the sentences of the judges, who in the progress of government are appointed by the state, come at last to be recognised as compulsory rules of action, and therefore deserve and acquire the appellation of consuetudinary law.

Nor does it by any means follow from the nature of this consuetudinary law, that it must necessarily be the formal expression of the will of individuals in their political or corporate capacity as members of the state. The

authority of custom appears to rest upon this foundation, that the private affairs of individuals do not originally fall under, or belong to the care or charge of the supreme power, and that individuals have not yet, at that stage of civilization, recognised the supreme power to the effect of being governed by it, in all such particular and minute matters. While no regular governments yet existed, men, united solely by the bonds of kindred or country, could scarcely avoid accommodating their actions to the opinions prevalent in the communities in which they lived, with regard to what was to be held just or unjust. We find tribes, which still live, without what can be called a political constitution, deciding their private disputes according to their customs and usages; a clear proof that the recognition of private rights may, in point of time, precede the establishment of regular governments.

In the progress of civilization, however, the transactions of individuals, in their mutual intercourse, become more varied and multifarious. The doctrines of legal relation become more complicated and intricate. Greater knowledge and skill and preparatory education become requisite, to enable the individual to expound them. The principle of the division of labour operates in law, as well as in all other branches of the national industry. The time arrives, when this necessary and important function of the body politic cannot be properly exercised, except by a portion of the community being educated, and adequately qualified for its discharge. Such a separation accordingly takes place, sometimes by the selection of certain families in succession, but generally, and much more advantageously for the public, upon the popular principle of the previous preparation of the individual for the performance of the duties. Even for the regular execution of important deeds and transactions extra-judicially, such previous qualification

is found necessary. And it is indispensable, for the examination and determination of disputed matters. Under this separate allotment of a portion of the community to the practice of it as a profession, the common law no longer exists merely in the usages of the nation, or in oral tradition; these usages and rules, previously recognised in practice, come to be recorded in writing for the determination of future disputes. The judges of the different tribunals, and the other professional practising lawyers come to form a distinct and important class of the community, and to be viewed, as in some measure, the depositaries of the law. They come to form one united body in the state, not acting, each according to his own particular views, but whatever differences of opinion they may have in detail, each following strictly the same method, and proceeding in his deductions from the same governing principles. The uniformity of the law, however freely its details may be discussed by a number of individuals, is thus preserved entire, and a communion of doctrine is thus established and maintained, not only among all the lawyers of the same age, but also among the lawyers of past ages, and of the present age, with such modifications and improvements of the doctrine, as experience may have suggested.

So much for the historical growth of the common law. With regard, again, to the statutory enactment of general rules for the conduct of individuals, it is not given to man to foresee the indefinite variety of events and cases which occur, even with reference to the comparatively limited number of matters, which require the compulsory interposition of the power of the community. And it is vain to expect, that any statute law, however apparently complete, can embrace and provide for every possible case.

As the legislative body has, in statute law, the oppor-

tunity of definitely expressing the rules which it lays down for futurity, it might, indeed, be expected, that there should be no difficulty in the subsequent ascertainment of these rules. Yet so short-sighted is man, and so imperfect is human language, that even here the interposition of another intelligent power in the state, is necessary; not merely to enforce the observance of the statutes, but to interpret the statutes, to deduce the legal consequences of the enactment, and to determine, what the legislature intended to enjoin, or prohibit.

The necessity for the admission of consuetudinary law arises, also, from the inability of man to foresee and provide for the multifarious transactions and indefinite variety of events and cases, which arise in the progress of society in the intercourse of life; and here a more difficult task remains for another intelligent power, besides the supreme legislative power, than the mere interpretation and enforcement of the general rules established by the latter. Where the statute law is silent, where the case is not embraced by the written law, the judicial power has to examine and ascertain what has been the practice and usual mode of acting of the individuals composing the community, in relation to each other, in such matters; and, if such practice has not been uniform and definite, to ascertain what views have been usually entertained by the great body of the community, in point of justice or reciprocity between individuals, and in point of general expediency and convenience, as a rule of action; and to decide accordingly. In this way the difficulty of foreseeing the indefinite variety of events, and legal relations, so much felt by the legislature, is avoided, as the case has occurred, before the application of the rule is required. But the difficulty of the other proceeding just mentioned, is almost equally great; and, it is only by a long-continued series of judicial determinations, recorded as they are pronounced, and transmit-

ted from generation to generation, that the common law of a nation is matured from experience, and those leading general principles elicited and established, which direct the conduct of individuals, and the decision of subsequent similar or analogous cases.

Of late years, a certain sect of juridical philosophers have been in the habit of decrying the common or consuetudinary law as judge-made law; and, in these declamations they have had a number of followers. But more profound and impartial investigation shows, that, while it derives its force from the combined action of the community, as much as the statute law, expressly enacted beforehand by the legislative body, the common law constitutes not only by far the largest portion, but the best portion, of the private law of every civilized nation, in point both of justice or individual reciprocity, and of general expediency. As society advances, the state interposes, and the arbiters, formerly chosen by the parties, are succeeded by judges appointed by, and armed with, the combined force of the community. And the common law, originating in custom and usage, thus accumulates, and continues to be unfolded, from age to age, by the exercise of the judicial power vested in the supreme tribunals of a people. Farther, in its correct exercise, the judicial power does not ultroneously and directly, like the legislative power, add to the bulk of the law of the state. It is not exercised unless required by a particular application, namely, a suit or action; and it pronounces only upon particular cases, and does not directly either establish or impugn general rules and principles: the latter being the function of the legislature, not of the judge. In the determination, too, of particular cases according to general understanding and acknowledged usage, according to justice or individual reciprocity, and according to general expediency, the judge cannot adopt two different or dissimilar

rules in the same or similar cases. He must give the same or similar decisions, that is, must adopt the same or similar rules, in the same or similar cases. The rules thus founded on the pre-existing legal relations of individuals, living in society, with reference to each other, and with reference to external objects, originating in custom, and unfolded by impartial observation, and recognised and applied to classes of similar actions, without any previous compulsory arrangement on the part of the state, except the appointment of judicial tribunals, thus come to constitute the great body of practical regulations for the conduct of the members of a community, in their private or individual intercourse. And there is therefore really no valid ground for denominating, as Mr Bentham does, the statute law, positive, and the common or consuetudinary law, conjectural; seeing, when established, they are both branches of the positive law of a state; and, it is believed, nearly as many practical difficulties and grounds for hesitation and doubt, occur in the interpretation of statutes, modern, as well as ancient, as in expounding the doctrines of the common law.

We thus arrive at a pretty correct notion of the sources and general component parts of the private law of a state. We have first the common law, the customs and habits of acting of the mass of the community, as adopted and followed from age to age, as ascertained by the recorded determination of the judicial power, and as moulded and modified by such determinations, proceeding upon impartial considerations of justice or reciprocity between man and man, and of general convenience and expediency. We have, in the second place, the statute law, the general rules enacted from time to time by the legislative power of the state, for the regulation of the conduct of its members in their private intercourse, as interpreted and explained by the judicial

power, properly so called. Thirdly, we have the rules of procedure of the judicial, executive, or administrative power, which procedure presupposes the rules of law, whether statutory or consuetudinary, as ascertained by the judicial power, properly so called, and merely enforce these rules by the application of the coercive power of the community, in the manner, and to the extent, which may have been found best adapted for the attainment of that end.

And here it is worthy of observation, that, while private law, as well as public law, as realized and established in any country, are, like all the other works of man, full of imperfections, and fall short of the plan, which not vague imagination, but sober, judicious, and enlightened experience, may enable us to devise; yet private law appears to admit of, and to have attained, much more the condition of a science, than public law. In the present state of human knowledge and civilization, the rules of private law, if not in themselves more clear, appear to have been more distinctly ascertained, than those of public law. If, in the former, the contentions of the individuals of whom the state is composed, be not less numerous, or less frequent, the controlling power of the state, is more effectually, steadily, and impartially exercised, than in the latter. The recorded experience of mankind appears to be greater in private, than in public law; and if not, physically, more easily reducible, the rules of the former have at least been more completely reduced, into a systematic shape.

While viewing private law as a science, or at least as susceptible of scientific arrangement, it may be proper here also to endeavour to ascertain, and to discriminate, the several significations of a few terms of frequent use in such discussions, namely, jurisprudence, legislation, and equity.

Jurisprudence.

In its origin, jurisprudence obviously signifies skill in, or knowledge of, law. But, as frequent, in other instances, the same term is used to denote, not only the intellectual act, faculty, or possession of knowledge, but also the collection, or assemblage of things, contemplated and known by the intellectual being. And, accordingly, jurisprudence is most frequently used to designate, not knowledge of law, but the collection, either *in cumulo*, or scientifically arranged, of the compulsory rules of human conduct. If applied to a particular nation, as the *jurisprudentia ante justinianea* of Schultingius, it means the collection of such compulsory rules, adopted and enforced by that nation. If used in a more comprehensive sense, it implies the collection of such rules usually observed by mankind, generally, when congregated in communities, and rather as arranged in some sort of scientific order, exhibiting those principles, which pervade the laws of almost all nations. And this last seems to be the most ordinary acceptation of the term. Jurisprudence, however, is also frequently used to denote, so far as discovered by man, the aggregate of those relations of individuals in their mutual intercourse, with reference to each other, and with reference to external things, which constitute compulsory justice, or reciprocal freedom of action, and general expediency in such matters; in other words, not positive law, not what law is, but what law ought to be. But, in whichever of these two last senses, jurisprudence be used, it seems to be confined to private law; and is very seldom, if ever, employed to designate the political, or public, constitutional, and administrative law of a state, either as it is, or ought to be; and in this limited sense, it is used in these observations. Of late years, too, apparently from

the influence of recent French phraseology, jurisprudence has sometimes been used in a still more limited sense, as denoting in particular that branch of the common or consuetudinary law, which is evolved and established by judicial determination—*Jurisprudence des arrets.*

Legislation.

In its origin, legislation obviously meant the making or enactment of laws by the supreme power of a state. But, chiefly, apparently, through continental usage, as in the *Scienza della Legislazione* of Filangieri, the *Traitès de Legislation* of Dumont, drawn up from the manuscripts of Bentham, and the *Traitès de Legislation* of Charles Comte, legislation has come to be used by us, also, in other and more comprehensive senses. Sometimes it is used to denote the whole body of law, public and constitutional, as well as private, as existing in particular countries. Sometimes it is used to designate the science of law, public and constitutional, as well as private, not as actually existing or realized in any country, but as what law ought to be, explaining the principles from which it is derived, and the application of these principles to localities and times. But recent practice likewise sanctions, what was plainly the original or primitive signification of the term, by restricting it to the representation only of that part of the national or internal law of a country, which is created immediately by the supreme power, acting in its legislative capacity, which has emanated directly from the legislature itself, as opposed to the common or consuetudinary law of a nation, exhibited in its recorded customs, and evolved by the judicial determinations of its tribunals.

Equity.

There is also another term, frequent in legal discussions, of which it is of importance to ascertain the different senses, in which it is employed. In its original derivation, equity appears to imply, equality of division among individuals, reciprocal allotment, impartial, proportional distribution. The synonymous term in the German language, *billigheit*, translated *æquitas*, professor Hugo describes, as the accordance of the event or result, with the rational idea of worth or merit, so that in similar circumstances, under similar necessities, and where there is similar merit, or similar culpability, the result be similar; and that in dissimilar circumstances, the result be also dissimilar, and truly correspondent. Thus not only is rigour, or severity, the opposite of equity, when it makes an innocent person suffer; it is also inequitable, when a person reaps an undeserved advantage.—*Naturrecht*, § 74. But, although such seems to be the original and correct meaning of equity, and may be traced throughout its various applications, it is certainly, both in spoken and written language, a very vague and indefinite term. Sometimes it is used in ethics, to denote the morality of actions; sometimes in law to denote a quality of statutes or judicial determinations. Thus, in this country, we talk, as Hugo says they do in Germany, of equitable claims in friendship, where there is no law at all; and of equitable statutes, where there is clearly positive coercive law. In his work on *Natural Jurisprudence*, professor Pestel opposes *æquitas* to *justitia*, and confines it to morals, and chiefly to those cases, where the individual either relinquishes, or abates his strict legal right. When some of the present French jurists, such as Lepage, talk of equity, as the foundation of all law, they

seem to designate, what, in this country, we term justice, or more correctly, the rules of that virtue, which relate to external actions only, and may be enforced, or, in other words, law as it ought to be. In Britain, although equity is frequently employed to denote merely the moral quality of actions, its more general use seems to be, if not in opposition or contradistinction, at least in reference to, and in abatement or modification of, law. And in this last acceptation it is most frequently applied to the doctrines of private law, in marking the relations between or among individuals, considered as such, and to the determinations of courts of justice in such matters; and is more seldom used, in reference to public law, to denote the relations between the community, state or government, and its citizens or subjects.

But equity is likewise used in several other more limited senses, which it may be proper to discriminate. In England, it is well known, equity, in the technical legal sense of that term, as opposed to, or distinct from, the common law, is, in reality, as much, as the common customary, or judiciary law, a part of the general law of the realm. It has come to be a separate department of the general law, enforced by separate courts, and jurisdictions, and seems to be the most artificial, delicate, and refined department of that law. Into the expediency, or inexpediency, of this artificial division of the internal private law of a nation, into common law, and equity, and of the establishment of different courts for the enforcement of these two separate departments of law, this is not the place to inquire. But beside this limited, and so far definite sense of the term equity, which appears to be peculiar to England, and is not recognised among the continental nations, or in Scotland, there is also another limited, but perhaps less definite, sense of the term, viz., that more mild administration of justice, and mitigation of the rigour of the more ancient positive rules of law,

by which these rules are modified, and adapted to the changing circumstances of a people. That such modifications, and adaptations, of the strict rules of the common law, established in ruder times, become expedient, if not indispensably necessary, in the progress of civil society generally, and in the advancement of each particular people, is abundantly obvious, from the legal experience of civilized nations. Hence the extension among the Romans, of the *actiones stricti juris*, by the *actiones bonæ fidei*, and of *hæreditas*, by the *bonorum possessio prætorea*. And to the designation of this gradual improvement and approximation of private law, to what it ought to be, by the term equity, there does not appear to be any good objection, provided the sense, in which the term is employed, be distinctly explained, and understood. But, amidst such a variety and looseness of acceptation, the real meaning of the author must, in most cases, be ascertained from the context.

Having thus considered at some length the legal relations of individuals to each other, arising from their congregation into communities, as recognised, and enforced by the coercive power of the state, and as gradually exhibited in the shape of consuetudinary and statutory law, we proceed to take a general view of the constituent or component parts of the private law of a nation, as derived from these sources.

Section Third.

Of the Component Parts of Private Law generally—Rights and Obligations of Individuals, and the Enforcement of them.

In the preceding inquiries, we had occasion to remark, that the two great objects in the internal private law of

states are to ascertain, first, what are the rules for the external conduct of individuals, of which it is generally expedient to enforce the observance by human sanctions, or through the coercive power, which, under the social union, the community is enabled to exercise over its members; secondly, what is the most expedient mode of enforcing these rules. And, of course, if, with the practical lawyer, we consider merely the existing private positive law of any particular nation, the corresponding objects are, to ascertain, first, what are the rules of action, of which the observance is actually enforced among its members by the coercive power of that particular state; secondly, what is the established and regular mode of enforcing these rules in that community. These propositions, perhaps, express what we mean generally by the objects to be aimed at, or attained in the science and art of private law, as comprehensively and distinctly, as can be expected in any general description. But to acquire the information, that is necessary for the jurist, or the practical lawyer, these general ideas must be unfolded, or rather perhaps resolved into their particular elements. We must first ascertain the different descriptions and classes of actions, of which it is expedient to enforce the observance, and next ascertain the modes, by which they are to be enforced.

With regard to the first of these objects, we have seen, that the actions of individuals living together in the social state, become the subject of coercive law, only so far as they are external, and so far as they affect, or influence the welfare of other individuals. And in the idea of coercive law, or rules of external action, prescribed, or at least enforced by the supreme power in a state, it is clearly implied, not only, that the rule is to be observed by one or more individuals, with a view to one or more other individuals, but also that it is to be observed by one or more individuals, for the behoof,

welfare, or benefit of another, or other individuals. The rule may, therefore, be said to be prescribed or enforced, for the behoof of the latter, and against the former. Now, to have a rule of law for one's behoof, or in one's favour, is just what we mean, when we say, one has a right. If the rule, which a person has in his favour, be a rule of compulsory or coercive law, or of justice, as limited to external actions, a rule, the non-observance of which is productive of positive evil, and which it is generally expedient to enforce, then he may be said, generally, to have a legal right, as distinguished from a mere appeal to the moral feelings and consciences of other men. If the rule, which a person has in his favour, be a rule of positive law, which is actually enforced by the supreme power in a state, which the members of the particular community may be compelled to observe, then that person is said to have a positive legal right, or a right by the law of that country. On the other hand, those against whom the rule of law is enforced, who may be compelled to observe it, may be said generally to be under a legal obligation. If it be a rule enforced by the supreme power of any particular state, the person or persons against whom it is directed, may be said to be under a positive legal obligation, or an obligation by the law of that country. Right and obligation are thus obviously correlative terms. Instead, then, of considering the different rules of private coercive law in the social community, we may inquire into the different rights and obligations of the individuals, of whom that community is composed, in relation to each other.

With regard to the second object in coercive law, the mode of enforcing the rules of external action, we have already traced the origin and foundation of the coercive power of the state, in the physical organization, mental and corporeal, of men congregated into communities. And from the operation of the causes before explained,

we find, that among all nations, which have arrived at any degree of improvement, the power of compelling others to observe any line of conduct in relation to himself, is withdrawn from the individual for the good of the whole community, and transferred to, and vested in the judicial branch of the government. Except in cases of personal self-defence, or of urgent and extreme necessity, no individual is allowed to vindicate his own right, or to take vengeance at his own hands. He must go to the magistrate or judge, and state his grievance; and it is the legal duty of the magistrate or judge, to exert the power, with which the community has invested him, and to give redress. To understand, then, how a rule of law is to be enforced, we must know, what are, or ought to be, the different courts of justice established in a country, what the mode of trial, and form of judicial process.

In thus viewing the particular rules of private coercive law under the aspect of the rights and obligations of individuals, resulting from their application, it will be remarked, we merely contemplate one and the same thing. And we prefer the latter mode of viewing the subject, partly because it appears to be more convenient for arrangement generally, for division and subdivision, partly because it is consistent and harmonizes with ordinary or customary, and, consequently, so far established, phraseology, from which the language of law ought at all times to depart as little as practicable.

Section Fourth.

Different Modes, in which Rights and Obligations may be Enforced—Private Law, divided into Civil, and Criminal, or Penal.

In proceeding to consider the different legal rights and obligations of individuals living under the same

government, there are two aspects, in which they may be viewed. They may be considered chiefly, either with regard to their ascertainment, establishment and enforcement, or with regard to their violation or infringement, and vindication or protection and security against farther or future infringement. When rights and obligations are considered chiefly with respect to their ascertainment, establishment and enforcement, a court of law has solely to examine and ascertain the facts, and to pronounce judgment, that such is the law in such circumstances, and that if it be not obeyed, such consequences shall follow, with reference to the persons or estates of the individuals concerned. On the other hand, when rights are viewed chiefly with respect to their violation or infringement, an offence or crime is committed; to maintain the security of the right in future, a punishment to repress the offence becomes necessary; something, it is generally expedient, should be done to the offender, to disable him from again violating the right, and to deter others from committing a similar offence. In the former case, the private individuals, who may conceive they have a right, are chiefly, if not solely concerned. In the latter case, not only the private individual, against whom the offence is committed, but also the community—the state, is concerned, from the interest the latter have in preserving social order, and in maintaining inviolate the private rights of individuals. Hence the well-known division of the internal law of a nation into civil, and criminal, or penal.

The assignment of its proper place, to criminal or penal law, has been attended with a good deal of difficulty, and led to diversity of opinion among jurists. Some have viewed it as merely the means of protecting and enforcing private civil rights, and have held it to be a portion of private law. And, no doubt, in the enforcement of civil private rights and obligations, the

power of the community, if not so prominently and conspicuously brought forward, is as really and effectually exercised, as in the punishment of the violators of these rights. Professor Hugo has remarked, that criminal law may be said to be situated on the borders between private and public law. And such is the interest of the community, and such the power exercised by the state, in the department of the criminal law, that it has been ranked by various jurists, and among others by the Roman lawyers, as a branch of public law.

The correct view seems to be, that criminal or penal law does not form or constitute a division of law, opposed to, or co-ordinate with, private and public law; but being merely an accessory, as the means of enforcing the rules, of private, as well as of public law, is applicable to both these branches. And we have thus a bipartite division, namely, private criminal law for protecting and vindicating the rights of private individuals, with reference to each other, and public criminal law for enforcing the rights and obligations of its members, in relation to the community or state, and of the state or government in relation to its members or subjects.

The grand object of both civil and criminal law is unquestionably the same, to enforce the rights and obligations of individuals. In this, they clearly both agree; what then is the peculiar province of each?

In the civil code, as before observed, the two great points are, the ascertainment of the rights and obligations of individuals, and their establishment or enforcement. The ascertainment of the right necessarily implies and requires a great deal of explanatory matter, so as to embrace the indefinite variety of cases which occur, many of them of a complex nature. But the mere ascertainment of the right would signify little, were it not established and enforced. The judge must not only pronounce a sentence declaring what the law is, in the

particular case; this sentence must be put in execution; and this execution may affect the person, as well as the condition and estate, of the individual, according to the nature of the right enforced. In the civil code, then, compulsion, or physical force, is necessary, as well as in the criminal. Here, however, the illegality being chiefly negative, a failure to perform, the province of the judge extends no farther, than to make the right in question, from whatever source it may arise, be observed, and the corresponding obligation obeyed or fulfilled.

In the criminal code, again, the two great objects for consideration, are, the positive act, the violation of the right, and what may be called, in one word, its vindication. Some of the most important rights, which the individual enjoys, are brought into notice, or prominent view, only by the infringement of them. And in this branch of the law, as in the civil code, a good deal of explanatory matter is also necessary, to ascertain and define the nature of the right invaded, and the mode of violation; in other words, to fix the description of the offence, or crime, which has been committed. But, here, as in the civil code, the ascertainment of the precise description of the offence would be of little importance, unless some means were devised to prevent the recurrence of such violation, and to secure the individual in the future enjoyment of his right. To enforce the particular right in question is impracticable; for this very right has been already violated. Restitution, or reparation, indeed, so far as it is practicable, may be enforced; but this belongs to the civil, not to the criminal code. In consequence of the violation of the right, there arises on the part of the aggressor, an obligation to make reparation, as far as the case admits of it; and a right on the part of the suffering individual to such reparation. And this right and obligation, like any other, it is the province of the civil judge to enforce, upon appli-

cation to that effect. All, then, that remains for the criminal law to do, is, when an offence has been committed, to prevent, as far as practicable, a similar offence from being committed by the same person, or other individuals generally. And the only means, the coercive power of the state possesses for this purpose, is by annexing certain artificial painful consequences to the performance of certain mischievous actions; in other words, by punishment. The principal end of punishment is thus to control future action; and this action may be either that of the offender, or of others.

According to the nature of the artificial consequences attached to offences, the future conduct of the offender may be controlled, either by their effects on his corporeal frame, on his estate, or on his station in the community, operating by way of disablement, deprivation, or degradation; or by their influence on his disposition of mind, and habits of life, operating in the way of reformation, as well as through the fear of similar renewed suffering. And whatever be the particular nature of these artificial painful consequences, the conduct of other individuals, than the offender, may be controlled by the influence of such consequences on their minds, in exciting the dread of suffering, and thereby deterring from the commission of similar offences; the infliction of the punishment operating in the way of example.

We thus form a pretty accurate notion of the distinct and peculiar provinces of civil and criminal law. The private civil law details the various rights and obligations of individuals; and enforces their observance through the medium of the person and estate of the individual subject to the obligation. The private criminal law details the various violations of these rights, and, to a great extent, operates the security of these rights, by the dread of the penal consequences, which it attaches to such violations.

This ancient, and almost universally recognised division of law into civil and criminal, therefore, appears to be founded, not so much on any real difference in the nature of the rules of law, or rights and obligations, which are to be enforced, as on the difference in the mode of procedure, which it is found necessary, or expedient, to adopt for that purpose. And it may, therefore, be expedient to assign these two branches of law, to different courts, or to the same court, at different times, and with different suitable modes of procedure.

Section Fifth.

Other Divisions of Private Law, as a Whole, into Portions, or Particular Departments.

Having thus traced the grand division of private law, according to its sources, into consuetudinary and statutory, according to its subject-matter, into rights and obligations, and according to the mode of ascertaining and enforcing these rights and obligations, into civil, and criminal, or penal, we stop, before proceeding to the distribution of private law into its subordinate departments, or more minute elements, to notice certain other likewise general divisions, which have been made, or may be made, of private law into portions, constituting wholes of themselves, inasmuch as they are applicable to the concerns, or interests of particular classes of individuals in the community, or to particular descriptions of external objects, moveable or immoveable.

Thus, one portion, or branch, of private law, may be denominated territorial, as embracing land-rights; another portion may be designated agricultural, as embracing the relative rights of landlords, and farmers or cultivators of the soil; another branch may be called rural, as applicable to the portion of the community, inhabiting

the country, provinces, or counties; another, urban, as embracing the relative rights and obligations, of landlord and tenant, and of the remainder of the community, living in cities and towns. Another portion may be designated the law of manufacturers, or of manufacturing industry, embracing the reciprocal rights and obligations, of master and operative tradesmen, by whom the rude materials, furnished by nature, either spontaneously, or when stimulated by human industry, are modified, and adapted to the various uses of life. Finally, another portion has been, and may be designated, mercantile law, the law of maritime commerce, by which the superfluities, natural or industrial, of one country, are exchanged for the superfluities of others, and the welfare and enjoyment of mankind in general promoted.

In a bulky, or voluminous, and complicated collection of laws, these different divisions may be necessary, or useful, for facilitating the understanding, and the practice of the law. But the portion of private law, which has chiefly been considered, and which deserves most to be considered, and cultivated separately, and by itself, is commercial and maritime law. This separate cultivation appears to be expedient and proper, not only on account of the great importance of this branch of law, and from its forming a kind of whole of itself, but also from the peculiarity, which distinguishes it, from the other branches of private law, namely, its great similarity, if not identity, among all the different nations, who have made much progress in civilization; the obvious consequence of the generally, if not quite universally, observed fact, that, in similar circumstances, men adopt similar rules of conduct. And we may, accordingly, perhaps, in a separate inquiry, afterwards take a more detailed historical view of the private law of maritime commerce.

Section Sixth.

Why in the preceding Observations, several of the Views, suggested by Mr Bentham, have not been adopted.

In the preceding views of the foundation and origin, and of the growth and establishment, of the internal private law of a nation, in the shape of consuetudinary and statutory, of civil, and criminal, or penal, law, we differ, in several important particulars, from the views of the subject exhibited by Mr Bentham; and we may here, with all due respect, explain the reasons, why we have not, in these particulars, adopted his views.

It has been justly observed, that the writings of Mr Bentham form, if not an altogether new, at least a very important era, in the history of legal science. And while we found it necessary formerly to express a decided dissent from his theory of morals, we cordially unite, not only with his immediate disciples, but with the southern continental jurists, generally, in admiration of his patient and exhaustive analysis, of the acuteness of his discrimination, and of the extent and profundity of his views in matters of law. These views were first communicated by him to the public, in the year 1789, in his *Introduction to the Principles of Morals and Legislation.* They were in part condensed, and, to a considerable extent, more fully unfolded, by his popular translator, M. Dumont, in the *Traités de Legislation, Civile et Pénale,* published in 1802, containing not only *Une Vue Generale d'un corps complet de Legislation,* but also *Principes du Code Civil, et du Code Pénal,* and *Un Essai sur l'Influence des Tems, et des Lieux, en Matiére de Legislation.* In subsequent years, at intervals, appeared a second edition of the work just

mentioned, *Theorie des Peines et de Recompenses, Tactique des Assemblèes Legislatives, Traitès des Preuves Judiciæres, de l' Organisation Judiciaire,* and *de la Codification.* And, since his death, an English edition of the greater part, if not the whole, of his works, is, in the course of publication, if not already completed.

In Mr Bentham's critical remarks on the general divisions of law, previously in use, as first published in 1802, by M. Dumont, in the *Traités de Legislation,* and recently republished in English, we in general concur. His objections to these ordinary divisions, as being incomplete, or otherwise defective, or erroneous, appear to be well founded. The grand division of law into *Droit Interieur* and *Droit de Gens,* may certainly be more distinctly expressed, by national law, or the internal law of a state, and international law; agreeably to the suggestion of Chancellor D'Aguesseau, and of Mr Bentham himself. The division of law into civil, and criminal or penal, is defective, as omitting the *Droit de Gens,* or international law. The division of law into civil, penal, and political, shows the last division, even as a division of the internal law of a state merely, to be incomplete; and the term political is ambiguous, as being applicable either to public, more definitely termed, constitutional, law, or to the *Droit de Gens,* more correctly termed, international law. The divisions of law into civil and temporal, and ecclesiastical and spiritual, and into civil and military or martial, are likewise faulty, inasmuch as civil is used in different senses, as opposed to ecclesiastical, and martial, as it was in the former divisions, to criminal or penal. Criminal law is obviously the more severe department of penal law. And the canon law is obviously a branch of ecclesiastical law.

But while we agree in these critical remarks, we must dissent from Mr Bentham in some of his other opinions

and observations. The distinction of law into written and unwritten, or more correctly into statutory, and common or consuetudinary, we have already seen, has a real foundation in nature, and flows from the different sources in which they originate, and from which they are gradually formed and accumulated. And there do not appear to be any sufficient grounds for denominating the former positive, and the latter conjectural; both being plainly branches of positive law. It is humbly conceived, too, that from among the divisions of law, already adopted, and familiar from use, without the introduction of any new phraseology, a sufficiently comprehensive and exact general arrangement, may be selected, such as the division of law into national and international; of national law into private, and public or constitutional; of private law into common or consuetudinary, and statutory; and into civil, and penal, including criminal. Nor does it appear that legal science has been much advanced by the new divisions of law, which Mr Bentham has suggested: such as laws substantive and adjective—meaning by the latter, the rules of judicial procedure: laws coercive or punitory, attractive or remunerative—the latter, it is submitted, not deserving the appellation of laws; laws general and particular; laws permanent or necessarily transitory; code of laws themselves; code of legal terms.

In passing from the general divisions of law, to the general constituent parts of law, Mr Bentham observes—In a code of laws, "every thing turns upon offences, rights, obligations, services;" and he gives an exposition of the relations of these legal entities, as follows:—"A period may be easily imagined, when men existed without laws, without obligations, without crimes, without rights. What would they then possess? Persons, things, actions; persons and things the only real beings;

actions, which exist only for a fleeting moment, which perish the instant they are born, but which still leave a numerous posterity.——Among these actions some will produce great evils, and the experience of these evils will give birth to the first moral, and legislative ideas. The strongest will desire to stop the course of these mischievous actions; they will call them crimes. This declaration of will, when clothed with an exterior sign, will receive the title of law.——Hence to declare by a law, that a certain act is prohibited, is to erect such act into a crime. To assure to individuals the possession of a certain good, is to confer a right upon them. To direct men to abstain from all acts, which may disturb the enjoyment of certain others, is to impose an obligation on them. To make them liable to contribute, by a certain act, to the enjoyment of their fellows, is to subject them to a service. The ideas of law, offence, right, obligation, service, are, therefore, ideas, which are born together, which exist together, and which are inseparably connected.——These objects are so simultaneous, that each of these words may be substituted, the one for the other."——"It is only by creating offences (that is to say, by erecting certain actions into offences) that the law confers rights."——"The division of rights ought therefore to correspond with the division of offences."——"The distinction between rights and offences is, therefore, strictly verbal; there is no difference in the ideas. It is not possible to form the idea of a right, without forming the idea of an offence. I imagine to myself, the legislator contemplating human actions, according to the best of his judgment; he prohibits some, he directs others: there are others, which he equally abstains from commanding or prohibiting." ——"This, then, is the connexion between these legal entities: they are only the law, considered under differ-

ent aspects; they exist as long as it exists; they are born, and die, with it. There is nothing more simple, and mathematical propositions are not more certain."*

Now, with deference, it does not appear that this view of the elements of law, carries with it, the evidence of mathematical truth, as Mr Bentham here seems to indicate, or that it is historically correct, with regard to the mode in which law has been actually unfolded, or accumulated, in any country. He certainly did not here mean to apply to law, Kant's *a priori* doctrine, of pure reason. Mathematical truth, as distinguished from physical, appears to be the mere consistency or necessary consequential connexion between the notions, which we have derived, and assumed, from experience, and described, or defined. And so far as regards mere consistency, in the descriptions, or definitions, we adopt in law, something like mathematical certainty, may be attained. But the feelings, or sentiments, of justice, or injustice, the perception of the reciprocity of voluntary action among individuals, and the ascertainment of the general expediency, or inexpediency, of certain courses of action, upon which all private law appears to be founded, are physical existences or events, and admit of no higher, or other evidence, than the evidence of fact, or induction from observation and experience.

In his exposition of law, too, just noticed, Mr Bentham, although he avoids the error of Montesquieu and Rousseau, and so many older jurists, in imagining an ideal state of nature, antecedent to civil society, falls into a similar error, in imagining a legislator, contemplating human actions,—by his fiat, creating crimes or offences, positive or negative,—thereby imposing obli-

* The passages here quoted, were first selected from the *Traitès de Legislation*, vol. i. p. 153, and literally translated; but are now presented, as translated in the recent English edition of Bentham's works, Part ix. pp. 158—160.

gations and services, and conferring rights,—and then distributing these rights, and obligations, among the members of the community. For, as the author here, obviously does not mean the supreme, and omnipotent, Creator of all, but a human legislator, it is plain, such a legislator is a mere fictitious personage, having no real existence, and unable, either to impose obligations, or to confer rights. The gratuitous supposition of such a legislator, merely removes the difficulty one step; and neither solves it, nor renders the origin and foundation of rights and obligations, more plain. These rights and obligations, we have seen, have their foundation in the constitution of mankind, living in society, or congregated into communities, and in the circumstances in which they are placed on this earth, during the present stage of their existence. These rights and obligations, come to be gradually perceived, or felt, and recognised, as civilization advances, without any such compulsory legislative creation, or declaration. When they are violated by aggressions on the persons, or acquisitions of individuals, or are not performed, and disputes arise concerning them, the portion of the community, who have acquired the power of controlling the rest, repress these aggressions, as dangerous to all, determine these disputes, and thus protect, and enforce the rights and obligations, some in a more, others in a less, complete, and efficient manner. And, historically, it is not till a comparatively advanced state of the community, that a legislator or body of legislators, acquire, or are invested with, the requisite power for arranging, digesting, and improving the laws and customs previously adopted.

Further, it does not appear, that the view, before stated, as given by Mr Bentham, of the elements or constituent parts of law, is quite correct, or elucidates the arrangements in detail, more than those views,

which have been usually adopted, among civilized nations. It is, indeed, historically true, or at least, highly probable, that the power of the community, or of those who *de facto* ruled the community, was first exerted in the repression of crimes and offences. So far, criminal law may be said, to have existed more early than civil law. And, from this cause, or from the belief, that greater facility, and distinctness of conception, were thereby attained, Mr Bentham appears, from the publication of his great work, in 1789, to have habituated himself to view law, chiefly, if not entirely, under the aspect of crime, offence, or delinquency, and punishment. But historical origin does not always afford good ground for logical division and arrangement; and, it seems rather preposterous, to commence with considering the violation or infringement of a right, before considering the right itself. Accordingly, in his penal code, Mr Bentham is obliged to found the leading division, and arrangement of offences, upon the difference of the rights thereby invaded, according as the offences may disturb the rights of personal liberty and safety, or the right of property, or the right of reputation, or the right of status or condition; and is thus forced to anticipate the doctrines of civil law, of which it had apparently been proposed to postpone the explanation.

Nor does there appear to be really any greater facility or distinctness in the conception of a crime, offence, or delinquency, than in the conception of rights from family relations, or from prior occupancy, or from skill, labour, and capital, bestowed in agriculture, or manufacture, or from express contract, to pay, or perform. Rights and obligations, and the protection and enforcement of them, are obviously the primary object of all human coercive law; and there may be a convenience in a separate classification of offences, or of the violations of these rights, and of the penal means of preventing such violations, under

the title of criminal, or penal, as distinct from civil law. But there does not appear to be any good reason, why the consideration of the latter should precede that of the former, much less, that the penal code should contain the whole of coercive law, applicable to the conduct of individuals in the social state, or should supersede the civil code. And it is not easy to perceive, what advantage can be gained by viewing the rules of law, or legal rights and obligations, solely under the aspect of their infringement, by beginning with, or excluding all, but penal law, seeing every offence and corresponding punishment, presupposes the existence somewhere of a legal right.

With regard to the new legal nomenclature or phraseology, occasionally adopted, or suggested by Mr Bentham, it is very questionable, whether any additional precision of thought or expression, which may thereby be attained, is not more than counter-balanced by its attendant disadvantages. When new terms, whether formed by combinations of words, already in use, in the vernacular living language of a people, or borrowed, or compounded, from the languages of civilized nations which have ceased to exist, such as what we call the learned languages, denote, *ex facie*, the origin, peculiar qualities, or simple or compound nature of the substance, they are real improvements, as brief indications of the progress the science has made, and of its present state. And, nowhere, have the advantages of such a new nomenclature been better exemplified, than in the sciences of botany, mineralogy, and chemistry. At the same time, even in the physical sciences of matter, perhaps, the zeal, if not the rage, for new phraseology, has been excessive, in the course of the last half century; and has, by the adoption of founding Greek and Roman words, generally terminating in ology, induced the generality of readers, and even thinkers, to believe, that

they know a great deal more than they really do know, from mankind being in general so prone "*Omne ignotum, pro magnifico habere.*" And certainly, in the science and art of law, particularly, such a new phraseology, is not only of difficult introduction, but of very doubtful expediency, from its departure from the ordinary language of the country, with which the people are familiar, in which they have been accustomed to speak and deal, or transact, and which they, therefore, understand with greater facility and distinctness. The province of law is to regulate the practical business of life; and the language it employs, should be equally free from metaphysical subtlety, and excessive refinement, as from affected erudition, and such, as to be intelligible to the great body of the community. From causes, which have not hitherto been very satisfactorily explained, the law language of England appears to depart further from the standard of ordinary spoken and written language, than is the case among the continental nations, either of the south, or of the north of Europe, since the disuse of Latin, or in Scotland. And this circumstance may have made Mr Bentham more desirous to introduce a new nomenclature. But the objects, perhaps, of such a new phraseology may be more speedily, with less difficulty, and with much more safety, attained, by endeavouring to attach more distinctness and precision to the terms already in use, or by translating the technical terms, as far as practicable, at the expense of some periphrases, into the conversational, and universally understood language of the nation.

CHAPTER VII.

OF THE SUBORDINATE COMPONENT PARTS OF THE PRIVATE LAW OF A NATION; AND HOW FAR THESE DETAILS ARE SUSCEPTIBLE OF SCIENTIFIC ARRANGEMENT.

HAVING marked the general divisions of human law into national and international—of national into private law, or individual jurisprudence, and into public, or constitutional, and administrative law; and again, of private law into common, or consuetudinary law, and statute law, and into civil, and penal, or criminal law; and having shown how all the rules of private law may be more conveniently, and more consistently with generally established custom, and with existing languages, be viewed under the aspect of the rights and obligations involved in these rules; we now proceed to consider in detail, the subordinate component parts of the private law of a state.

Although from the manner in which law has generally been cultivated, systematic arrangement may have been later of being introduced into this, than into other departments of human knowledge, it should seem, the advantages of method must be equally great in the study of law, as in that of the other branches of science, inasmuch as it facilitates comprehension, abridges labour, assists the memory, and trains the intellect to accurate judgment. Notwithstanding these considerations, indeed, the utility of juridical arrangement has been sometimes disputed, at least, of general legal arrangement,

so far as it goes to bind together the detached subordinate parts of jurisprudence; and a preference has sometimes been given to special treatises on insulated subjects, or on particular branches of law, without any regard to general connexion, as being more suited to actual practice. But, into such a controversy, there is happily no occasion to enter, for the two plans are not incompatible; and, if each has its advantages, a more complete or perfect plan than either, must be the combination of the two. The mere practical man of business cannot suffer by having his special details linked together, and framed into one consistent whole, in which the different objects of law may be perceived at one comprehensive glance; and the theoretic lawyer must be a gainer, by having his general principles pursued through all the detailed variety, and ramifications of particular cases, and thereby more adapted to practice.

We shall first inquire, historically, what are the chief methodical arrangements of the component parts of private law, which have been adopted, or recommended; and then inquire, to what objections these arrangements have been, or may be considered liable; what improvements have been suggested; and what arrangement appears, upon the whole, to be the most complete, or rather, the least exceptionable.

The want, as well as the advantage, of a clear arrangement, and distinct classification in the science of private law, among the Romans, was admitted and recognised by Cicero, at the termination of the republic: "Si-quispiam effecerit, ut primum omne jus civile in genera digerat, quæ perpauca sunt; deinde eorum generum, quasi quædam membra, dispertiat; tum propriam cujusque vim definitione declaret, perfectam artem juris civilis habebitis; magis magnam atque uberem, quam difficilem atque obscuram."—*De Oratore*, L. I. § 42.

When the Roman law had arrived at full maturity,

and had nearly reached all the perfection it was ever destined to attain, the arrangement adopted by the eminent juris-consult, Gaius, a copy of whose valuable work has, within these few years, been so happily discovered, was "I. De Personis, De Jure Personarum, De Conditione Hominum; II. De Rebus, De Rerum Divisione, et Adquirendo eorum dominio; III. De Actionibus," with the antecedent, "De Obligationibus." Paulus and Ulpian appear to have recognised a similar division; it being a matter of doubt, historically, but otherwise of little importance, whether the third branch was twofold or complex, or whether the two articles, *De Obligationibus*, and *De Actionibus*, did not form branches of the grand division, co-ordinate with the first and second, so as to render the division quadripartite, instead of tripartite. The adoption of that of Gaius, was the only attempt at general arrangement made under the authority of Justinian; "Omne jus vel ad personas pertinet, vel ad res, vel ad actiones." It is confined to the institutes; for the divisions of the digest into seven parts, and fifty books, and of the code into twelve books, do not deserve that appellation. And such has been the influence of the example, set, in this respect, by this extraordinary people, that, for a long series of centuries, after they had ceased to have power, or existence, as a separate, and independent, nation, the classification of Gaius has been followed by the greatest part, not only of commentators on the Roman law, and of the authors of elementary treatises, but even by the compilers of the codes of private law of the modern European nations. The Prussian *Corps de Droit*, or code Frederic, which appeared towards the middle of last century, so far as completed, consists of two parts, the law of persons, and the law of things. The recent French *code civil*, commenced by the republican government, and finally established, through the energy of Napoleon, adopts the

same general arrangement; inasmuch as it is divided into three books, of which the first is entituled *Des Personnes*, and the second, *Des Biens, et des modifications de la Propriété.* And, even, in England, where, from causes, which have not hitherto been very distinctly explained, the Roman law possessed less influence, than in any other country of Europe, Judge Blackstone, obviously in imitation of the emperor Justinian, divides the private law of the nation, into the rights of persons, and the rights of things.

But there is, obviously, a great defect in this Roman arrangement, as affording a principle of division, and subdivision; inasmuch, as, it mixes, and confounds, fact with law, and assumes as the objects of law, persons, and things, which are no more the objects of human law, than they are the objects of the greatest number of human arts, and sciences, such as anatomy, physiology, and medicine, the different branches of natural history, and mechanical and chemical philosophy. Accordingly, although the Roman arrangement has been, as we have seen, very generally followed, and although the great French lawyer, Cujacius, the learned investigator of the more classical sources, or rather remains of the Roman law, anterior to Justinian, may, in the sixteenth century, have characterized those, who objected to it, as "ineptissimi et imperitissimi," we find, that several other jurists, though not so learned, yet, perhaps, in this respect, more acute, became in the course of the sixteenth, seventeenth, and eighteenth centuries, fully sensible of the defect alluded to, and endeavoured to suggest a substitute, some with more, some with less success.

In the improvement of juridical classification, it was to have been expected, that those jurists, would have taken the lead, who professedly devoted themselves to the cultivation of law, generally, as a science, under the title of *Jus naturæ et gentium.* But this was not the

case. The primary object, of the great work of Grotius, was international law; and, as subordinate to this object, his discussion of the private law of a state, is only introduced, incidentally, does not appear to aim at, and certainly does not exhibit, any good general arrangement; so that Thomasius could only remark, and Leibnitz agree with him, "Grotii ordinem, si non optimum, certe, nec pessimum." The works of Pufendorff, and Thomasius, are more methodical. But neither do they exhibit much improvement, on the Roman arrangement. And, as we have already seen, almost all these works on the *Jus naturæ et gentium*, combine morality with law, and mix up the legal rights and obligations of men, united in society, in relation to each other, with their moral duties to God, as their Creator, and their prudential duties to themselves, so as to confuse the divisions of the former, which alone are the subject-matter of coercive, or positive, law.

Looking, then, to the works of jurists, who lived during the course of the last three centuries, who were neither mere commentators on the Roman law, nor professed writers on the *Jus naturæ et gentium*, we find that towards the close of the sixteenth century, (1591,) Bodinus, the French jurist, published, not only his *De Republicâ Libri sex*, a surprising work for the age, in which it was written, which, however, of course, from its title, treats chiefly of public, or constitutional law, but also a short treatise, more applicable to private law, entitled *Juris Universi Distributio*. In this treatise, jurisprudence is thus described and divided: "Ars tribuendi suum cuique, ad tuendam hominum societatem; hæc ad quatuor causas, ac totidem quæstiones, referri potest. An sit, quid sit, qualis sit, cur sit? Eadem quatuor partibus constat, lege, equitate, legis actione, judicis officio." Farther, according to Bodinus, law is twofold, natural and human; natural law, is inculcated by

our reason; human law is the work of man; human law is divided into *Jus gentium*, and *Jus civile*. And the small degree of improvement made by him on the Roman classification, appears from this passage: "Materia, circa quam omnis de jure quæstio versatur, in personis est, aut in rebus, aut in factis, et dictis, personarum."

About the beginning of the seventeenth century, Vulteius, in his *Jurisprudentia Romana*, (1610,) divided private law, into two parts; in the first, *De jure absoluto*, he explained the rights and obligations, which do not imply the previous existence of other rights; in the second, *De jure relato*, he treated of the rights and obligations which exist, only because other rights, or obligations, have been violated, or are threatened to be so. And so far as he thus distinguished the rules of private law, into those, which are absolute or primary, or principal, and those which are merely relative, or secondary and auxiliary, the division of Vulteius appears to be well founded.

In the early part, also, of the seventeenth century, 1605—1623, Lord Bacon composed and published his celebrated work, *De Augmentis Scientiarum*; and it is deeply to be regretted, he devoted so very small a part of that work to the science of law, either public or private: the only portion applicable to the former, being the very short *Tractatus de Proferendis Finibus Imperii*; and the only portion applicable to the latter, being the likewise unfortunately too short *Tractatus de Justitiâ Universali, seu de Fontibus Juris*. We have already had, and will still have, frequent occasion, to refer to, and repeat, the profound philosophic views, contained in the last of these treatises, concerning the origin, the objects, the qualities, the progress, the revisal, and the digested compilation of human laws. But, it does not suggest any detailed arrangement, of the constituent parts of private law.

About the middle of the seventeenth century, (1667,) the celebrated *Leibnitz, in his Methodus Nova Discendæ Docendæque Jurisprudentiæ, Pars* II.,* thus clearly pointed out the defects, or faults, of the Roman mode of classification, "Primum in ipsa methodo Justinianea, labor crescit in duplum; dum alia est institutionum, alia digestorum, codicisque, methodus. Institutionum methodus per personas, res, et actiones, primum superflua est; actiones, enim, tam ex jure personarum, quam rerum, descendunt. Et, ut breviter dicam, est haec methodus, non ex juris, sed facti, visceribus, sumpta. Persona enim, et res sunt facti; potestas, et obligatio, juris, termini. Et, si, semel methodum facti eligere voluit, cur non continuavit; cur non subdivisit personas, et res, in physicis, et ethicis; personas in surdos, mutos, cœcos, viros, fœminas, divites, pauperes; res in dividuas, individuas, pretiosas, viles? Cur, inquam, non ita titulos juris distribuit; et in singulis, quid juris esset, explicuit? Agnovit, scilicet, hac ratione, secuturas infinitas repetitiones; nec posse rem ad universalia redigi.

In the passage just cited, the main objection urged by Leibnitz to the Roman division of private law into persons, things, and actions, is certainly valid and of importance. For the arrangement is obviously taken from, and founded upon, not matters of law, or differences in the component parts of law, but matters of fact, or differences, in substances, mental and material, leading to indefinite repetitions; and the division is not deduced from the only existing differences, which can reasonably serve as a basis for a juridical classification, viz. the differences observed to exist, among rights, and obligations.

While Leibnitz, however, has thus exposed the faults of the Roman classification, he has not been so successful, in the classification, which he seems to recommend in

* Dutens, 1768, Vol. IV. pars iii.

its stead; it being, as he, himself, remarks, "*facilius carpere, quam emendare.*" It is in the causes which give rise, or put an end, to rights, and obligations,—in the modes of acquiring, or ceasing to have, them, that Leibnitz searches for the principle of their classification; and he distinguishes, as *Universi Juris Summa Capita*, five causes of rights—nature, succession, possession, convention, and delinquency. But although ingenious and comprehensive, and so far correct, as it views persons and things, as merely the subject-matters, about which law is conversant, and holds that any distribution of the constituent parts of jurisprudence, must be taken from law, not from fact, this arrangement of Leibnitz has many imperfections. The term nature, used to designate the first of these causes, is so very general, vague, and indefinite, as to be applicable to, if not to embrace, the others. And as Leibnitz understood by convention, even the law itself, which he views as the result of the consent, at least tacit, of the whole members of the community, it is evident, that to this fourth cause, might be referred, almost all the others, particularly succession; so that the members of the classification are not separate and distinct. Further, as remarked by J. B. Bon, the author of the preface to the juridical works of Leibnitz, although the doctrine of that philosophic jurist, that all the divisions of the science of law, must be drawn from the differences of rights or obligations, be sound and correct, it, by no means follows, that the diversity of rights and obligations is to be estimated, as arising solely from their different origin, or from the different causes, which produce them, rather than from their different nature, or from the different relations in social life, of the individuals, to whom they belong, or upon whom they are incumbent. It may often happen, that rights which have the same origin or cause, are dissimilar from each other, and

ought, therefore, to be distributed into different classes; and that rights, which have a different origin, ought to be conjoined in one class, because they have many other similar attributes. This division of Leibnitz, although derived from the sources of rights and obligations, may thus be far from convenient; and accordingly, it has not been found calculated to be of much use in practice.

About the same time with Leibnitz, (1681, 1693,) the able, and profound, Scottish lawyer and judge, lord Stair, remarked the erroneous nature of the Roman division of private law. "The Roman Law," says he, "taketh up, for its objects, persons, things, and actions: "and according to these orders itself. But these are only "the extrinsic object and matter, about which law, and "right, are versant. The proper object, is, the right "itself, whether it concern persons, things, or actions; "and according to the several rights, and their natural "order, ought to be the order of jurisprudence." Thus, according to Stair, the formal and proper objects of law are the rights of individuals; and these he distinguishes into the three following:—1st, Personal liberty,—2nd, Obligation, which is either obediential, or conventional; —and 3rd, Dominium, comprehending property, and all other real rights.

This arrangement is simple, and comprehensive, and as a mere general division, without descending to particulars, it appears to be complete and correct, with one imperfection. The division of obligations into obediential and conventional, seems to be exceptionable. By obediential obligations, Stair understood those, which a man owes, from obedience to the Deity; by conventional, those, which he owes in consequence of his own consent and engagement. But the foundation of the obligations here called obediential, whether it be the will of the Deity, or natural justice, or individual reciprocity, or general expediency, is plainly

the foundation of all obligations whatever, conventional, as well as others. And the basis of a distinction, among obligations, must, therefore, be sought elsewhere, than in the common grand principles, the ultimate foundation, on which all rights, and obligations rest.

While Leibnitz, and Stair, proposed a new classification of the constituent parts of private law in Germany, and Scotland, Domat in France, towards the close of the seventeenth century, composed his work, "*Les Lois Civiles dans leur ordre naturel.*"* He was certainly a highly estimable jurist; and his observations on methodical arrangement in law, are very judicious. But he appears to have erred, in mixing up together, what Grotius had distinguished, the different, and separate, though in many respects, kindred sciences, of natural theology, and of human coercive, or positive law. And, although his classification is ingenious, and so far correct, it is, by no means, so complete as his views of juridical arrangement would have led one to expect.†

Domat's fundamental proposition seems to be, that God, having destined men for society, has established certain ties, or connexions, which bind and oblige them, in their social intercourse; that the order of society is preserved, by these ties, or engagements; and is perpetuated by the series of succession, by which the living take the place of the dead. And, abandoning, therefore, the vulgar general division into persons, things, and actions, he divides the whole of private law into two great parts, engagements, which may be accurately enough, translated obligations, and successions. First part:—Engagements or obligations, he observes, are of two kinds;

* 1702, second edition.

† See on the subject of the classification of the component parts of private law generally, an article by M. H. Blondeau, Themis iii. p. 246.

first, those which are common to all, and do not form, in each individual, any single relation binding him to one person, more than to others: and, secondly, those, by which God binds certain persons to each other, more nearly, and determines them to perform towards each other, duties, which no one could perform equally towards all. These particular engagements, again, he remarks, are of two kinds; those, which are formed by marriage and birth, and constitute the natural connexions of family and kindred; and those other multifarious engagements, by which men have communication with each other in the intercourse of life, with regard to their labours, their mutual aid, or services, and the use of external things. These last obligations, again, are either voluntary and mutual, formed by the common will of the parties, by convention; or they are involuntary, formed without such conventions. And all these engagements have different attendant consequences or accessories which may be reduced to two kinds; those which add to, or confirm engagements, and those which diminish, limit, or annihilate, and extinguish engagements. Second part:—Successions, are either legitimate, or in virtue of the law, *ab intestato*, or testamentary; and the latter comprehends testamentary deeds containing the nomination of an heir, donations, *mortis causâ*, and legacies, substitutions of heirs, or entails, and *fidei commissa*, or trusts.

Such is generally the arrangement of Domat. But this general division into engagements or obligations, and successions, plainly does not embrace, and exhaust, all the constituent parts of private law, or afford a satisfactory basis for subdivision, or detailed arrangement. And, while property, and other real rights, are in a great measure omitted, even the personal obligations arising from the connexions of family, are not fully unfolded.

Next, in point of time, occurs the classification of the

Prussian chancellor, *De Cocceii*, as exhibited, not so much in the Code Frederic, the compilation of which, he appears to have superintended, as in his own introductory dissertations, to his father's commentary on Grotius. And in this *Novum Systema Justitiæ Naturalis et Romanæ, in quo universum jus Romanum, Novâ Methodo, in Artem redigitur*, (1748), he certainly appears to have improved considerably the old division into persons, things, and actions. After treating in the first book, *de Justitiâ et Jure in genere*, and in the second, *de Jure Dei in Homines*, he proceeds in the third book, to treat *De Jure Personarum, seu de Jure, quod cuique competit ex Hominum statu;* first, *de statu Hominum in genere et personarum differentiâ, quoad effectum juris;* next, *de statu familiæ*, and then *de statu civitatis*. In the fourth book, he treats *de jure quod cuique hominum, naturali ratione in res competit*, discussing dominion or property, and the modes of acquiring or transferring it. In the fifth book he treats *de jure, quod cuique competit ex obligatione personæ*, first, *de obligatione personæ in genere, ex quibus causis descendit, et de modis tollendi obligationem;* next, *de verâ origine juris, quod ex personæ promissione, seu pacto, ac contractu, oritur;* next, *de accessionibus conventionum et interpretatione pactorum;* next, *de jure quod cuique competit ex delicto alterius*, and then, *de obligatione personæ ex variis causarum figuris, ex quasi contractu, et ex quasi delicto*. And, in the sixth book, he treats *de defensione jurium, contra concives*, and *de processu inter privatos*.

About the middle of last century, Judge Blackstone published his Commentaries on the Laws of England; and the excellence of the work, as a popular exposition of the laws of his country, has been almost universally acknowledged, to the full extent of its merits. But in his general arrangement of the constituent parts of the

private law of a people, the author has not been so fortunate, whether from his not having himself formed any very distinct or precise notions on the subject, or from the peculiar doctrines and phraseology of the laws of England, not easily admitting of an ordinary scientific general classification.

Beside the separation of the private, and the public or constitutional law of the realm, not being observed, where, for the sake of distinctness, it is desirable, and where it is easily practicable, the division of the primary objects of the law into rights, and into wrongs, that is, the violations or infringements of rights, is rather quaint, and not very logical. The division, again, of rights into the rights of persons, and the rights of things, is either incorrect in idea, or not strictly grammatical in expression. All rights are the rights of persons; for rights are obviously the attributes of persons only. Things, or external material substances, can have no rights; and, accordingly, the author is obliged to explain the rights of things, as really denoting the rights of persons to, in, or over things. The next division of things, as the objects of the right of property, into things real, and things personal, is perhaps to be ascribed more to the previously established phraseology of the law of England, than to Blackstone; but is by no means unexceptionable. Things immoveable are correctly enough denominated things real; but things moveable are equally real, equally partake of the nature of external substances; and yet they are termed things personal; thus confounding the distinction in nature between real and personal rights, and treating of property, that is a real right, in things personal. Again, the division of real property, that is real rights in things immoveable, into corporeal and incorporeal hereditaments, though attributable to older English lawyers than Blackstone, is neither physically, nor logically,

very correct. All rights are merely legal relations between or among persons, with reference to the persons or actions of each other, or with reference to external substances; and are, therefore, all incorporeal. The external substance, or body, is not the right, but the object of the right, which may either be corporeal, viz., an external substance, or incorporeal, such as pecuniary debts, or obligations *ad factum præstandum*, arising from contracts or otherwise. And the absolute and complete right of property, in land, is not more corporeal, or less incorporeal, than the various subordinate rights and interests in land, into which the full right of property may be divided. As little does any general scientific order appear to have been observed by Blackstone, in his consideration of the various titles to things real, and things personal. But it is unnecessary to pursue these observations any farther. The scientific jurists of England, require not, now, any extraneous suggestions for improving the arrangement of their laws.

About the middle of last century, also, the very learned and acute French lawyer, Pothier, not only, in his valuable *Traités de Droit Civil, et de Jurisprudence Françoise*, laid the foundation of the greatest part of the French codes, soon after commenced by the Republican government, and completed through the, in this respect, well-directed ambition of Napoleon,* but also undertook and finished a new arrangement, both general and particular, of the Roman law, under the title of *Pandectæ Justinianeæ in Novum Ordinem Digestæ*. While, however, the minute arrangement, by Pothier, of the particular subjects, and subordinate titles of the Roman law, is not only worthy of the classic lawyers of Rome, but distinguished by its discriminating

* Dupin, Dissertation sur la vie et les ouvrages de Pothier.

and accurate analysis, he has not been equally happy in his general division of private law into its grand constituent parts.

The idea of this, new general classification, is said to have been suggested to Pothier by Chancellor D'Aguesseau; and this systematic view of the general principles of law, placed by Pothier, in his edition of the Pandects, under the last title, *De Regulis Juris*, is divided into five parts. The first part expounds, 1st, Those general principles of law, which are not peculiar to any particular matter, or department, of law; and, 2d, Those rules, which relate to the constitution, or establishment, force, interpretation, and publication of laws. In the second part, entituled, *De Personis*, are explained, 1st, The various divisions of persons, with reference to their state and condition; 2d, The various qualities of persons, which require to be attended to, in law, sex, age, &c.; 3d, The various rights to, or over persons, the power of the father, of the master, &c.; 4th, The various family connexions of persons, including marriage, divorce, &c. In the third part, entituled, *De Rebus*, there are first explained, the ordinary divisions of things into things of divine, and things of human right; and of the latter, into things common, public, and belonging to corporations, and into things of private right. These last are then divided, into *res privati juris corporales*, and *res privati juris incorporales*, according to the exceptionable division of Justinian, but adopted, also, in the laws of several modern nations. Under *res corporales* are considered possession, property, and *usucapio*, or prescription. And under *res incorporales*, are expounded, as different species thereof, 1st, Servitudes; 2d, Pledge and hypothec; 3d, Civil inheritance, or succession, testate and intestate, legacies and trust-deeds testamentary; 4th, *Bonorum possessio*, or præ-

torian succession; 5th, *Jus crediti, seu de obligationibus*, embracing conventions, and the various classes of contracts, loan, mutuum and commodatum, pledge and deposit, stipulation, mandate, society or partnership, sale, lease, hire, condictio indebiti, negotiorum gestio, de communi dividundo, actio institoria et exercitoria, obligations ex quasi contractu, ex delicto et quasi delicto, de reis principalibus, de fidejussoribus, de solutionibus, de novatione, &c. The fourth part treats of judicial procedure; of actions at law, and the mode of conducting them, of exceptions, interdicts, and the means of execution; and also of criminal prosecution and trial. The fifth part merely treats de nonnullis capitibus, ad jus publicum pertinentibus,—of certain matters of public law.

While the chief merit of this classification, as a general arrangement, seems to consist in treating *De variis personarum necessitudinibus*, of the connexions of family, under a separate head, and in the methodical explanation of judicial procedure, its defects are sufficiently obvious. Pothier has so far continued the erroneous division of persons and things, as the subjects, or constituent parts, of law. He has not clearly distinguished, what belongs to private, from what belongs to public law; and, as Blondeau observes, he has almost entirely effaced the distinction, so important, between the *jus in re*, and the *jus ad rem;* and has still farther increased the influence of the very exceptionable, if not absurd, distinction of things, into corporeal and incorporeal.

Before the death of Pothier, (1782), but apparently without any acquaintance with his works, Professor Millar, of the University of Glasgow, had commenced his Lectures on the Roman Law, and on General Private Jurisprudence; and had proposed an arrangement, of which the following is a short notice:—

The objects of law are two: rights, and actions, or the judicial means of enforcing these rights. Rights arise either from the distinction of persons, or from the distinction of things. The distinctions of persons arise from their different relations in society, as husband and wife, parent and child, master and servant; and hence so many rights. On the other hand, rights from the distinctions of things arise from the various objects of right, and the different exertions made to obtain them. They are either real or personal. In a real right, we have immediate connexion with the thing itself, and direct power over it. In a personal right, we have merely a remote connexion with the thing, through the medium of another person; a power over another person, so as to obtain the thing. Real rights are four,—property, with its limitations, servitude, pledge, and exclusive privilege. Personal rights, or obligations, are of three different kinds, as they arise from convention, delinquency, or equity and utility.

Of all the classifications of private law, we have yet considered, this is clearly the most simple, and the most comprehensive; and will merit particular attention, when we come to inquire what is the best arrangement. At the same time, in some of its parts, it is not, perhaps, quite unexceptionable. The enumeration of rights, under the general heads, from the distinction of persons, and real rights, is, perhaps, not quite complete; and it is rather awkward, to withhold the appellation "personal" from rights, which actually arise from the distinctions and relations of persons, and to apply it to a subdivision of rights from the distinction of things,—viz., to those multifarious instances of *jus ad rem*, which have otherwise been designated obligations. It is rather inconsistent, also, to give the name of rights from the distinction of things, and not from the distinction, or relation of persons, to those rights, which

imply a close, immediate, and direct connexion with, and power over, the person; and which, at the same time, imply no connexion, or, at most, only a remote one, with the thing, and no actual power whatever over it. The subdivision, too, of obligations into those arising from convention, from delinquency, and from equity and utility, may be liable to objection with reference to the third head. For, if equity and utility be taken in a broad sense, then all rights and obligations arise from equity and utility, or justice, and general expediency. And, what is thus, the foundation of all obligations, cannot well become the basis of a minute subdivision of obligations. If, on the other hand, equity and utility be taken in a limited sense, and by the obligations thence arising are meant those which are introduced at a later period, in the progress of law, as distinguished from the obligations arising from contract, or delinquency, which are enforced at a much earlier period, still the subdivision may not be altogether unexceptionable. For the principle of the arrangement is not a distinction, founded, on the general nature of man, which prevails in all situations, and at all periods of society. It is a distinction, which is merely temporary, which prevails at a certain period of civilization, and which, at the time the arrangement is formed, may have ceased to exist. For what is now considered a rule of equity, may, in the progress of time, be reckoned a rule of common and strict law. And, were we to distinguish all rights and obligations, according to the periods, when they first came to be enforced, our arrangement behoved to vary with the legal chronology of every particular country.

We have now arrived at the close of the eighteenth century, the æra of the two great schools of law, of which some account has already been given—the Historical, and the Analytical. And it only remains, to notice the

improvements in the classification of the constituent parts of private law, which they may have introduced.

In viewing law, as a science, the German jurists of the historical school, appear to have so far followed the philosophy of Kant; and it may, therefore, be proper shortly to advert to the arrangement which that philosopher has proposed, in his Treatise on the Elementary Principles of Law.

In point of form, Professor Hugo remarks, Kant's Metaphysical Principles of Law, as a science, Metaphysische Anfangsgründe der Rechtslehre (1798), bear a great resemblance to his much earlier work, the 'Metaphysical Principles of Natural Science. In this juridical treatise, he approached very much to positive law; he distinguished law from morality, through the possibility of external legislation; he assumed as a postulate, a legal, or juridical state, or condition, as necessary for all peremptory legality, in opposition to the merely provisional; and he divided rights to external objects, into the three heads, which the Romans had distinguished, only with the improvement suggested by Pütter, that the family relations should stand not foremost, but last.

On examining Kant's work itself, we find, he divides law into private and public, and considers private law as the doctrine of mine and thine external. In the first chapter, he treats of the mode of having something external as one's own. He commences, agreeably to his mode of philosophizing, with stating the juridical postulate of practical reason; explains and defines the possible idea of an external mine and thine; deduces the idea of the merely juridical or legal possession of an external object; then applies the principle of the possibility of the external mine and thine to the objects of sense and experience; and shows that, to have an external thing as one's own, is only possible in a juri-

dical or legal state, under a public legislative and judicial power, that is in civil society.

In the second chapter, he treats of the mode of acquiring something external. After explaining the general principle of external acquisition or appropriation, he divides it according to its matter, its form, and its ground, or foundation. According to the matter or object, there is acquired, either a corporeal thing or material substance, or the prestation, causality, or instrumentality, of another person, or this other person himself, that is his condition, or state, so far as a right is acquired to dispose of it. According to the form, or mode of acquisition, it is either a real right, or a personal right, or a real personal right, the possession, though not the use, of another person, as a thing. According to the rightful ground or title of the acquisition, which is not properly a particular member of the division of rights, but is yet an element of the mode of its exercise, something external is acquired, through the act of one will (*unilateral*), or of two wills (*bilateral*), or of the will of all (*omnilateral*), viz., *facto*, *pacto*, *lege*.

In the first section of this second chapter, he treats of real rights; defines a real right to be a right to the private, or individual use of a thing, in the common possession of which, (original or subsequently established), one is, along with all others; maintains, that the first acquisition of a thing, could be no other, than that of the soil; that the ground of the possibility of this individual acquisition of parts of the soil, is the original communion of the national territory in general; and explains the legal act of this acquisition, occupancy, physical possession, appropriation.

In the second section of this second chapter, he treats of personal rights; defines a personal right to be the possession, by one person, of the will of another, as

the faculty or power to determine that will, through his own will, to a certain action, according to the laws of individual freedom; in other words, the external mine and thine, in regard to the causality of another; and he explains the acquisition of such rights, by offer and acceptance, convention, or contract.

In the third section of this second chapter, he treats of personal real rights—of personal rights, of a real kind or nature; defines such rights to be a right to the possession of an external object, as a thing, and to the use of the same, as a person; and explains the rights of the family, or domestic society, under the titles of marriage, parents and children, master and servant. And this section he concludes with a division and enumeration of all the rights, which may be acquired by paction or contract; explaining the nature of money as a circulating medium of exchange, and the right of authorship.

In an episodical section to this chapter, he treats of the ideal acquisition of an external object, called by him ideal, as having no causality in time, as having no antecedent in the external world of sense, from which it can be correctly deduced, as an effect from a cause, and as therefore having for its foundation a mere idea of pure reason. And under this head, he explains the doctrines of prescription, of inheritance, or succession, of posthumous reputation.

In the third chapter of his work, he treats of acquisition by the sentence of public judicatories, which is dependant, of course, on the condition of the existence of such judicial establishments. And, here, he introduces the fulfilment of promises of donation, the redelivery of articles lent gratuitously, the vindication and recovery by the owner, of things lost, and judicial oaths.

From this short review of his juridical treatise, we

find the metaphysical philosopher of Königsberg opened views of private law, which had not been taken by the jurists, either of ancient, or of modern times. And, although we shall have occasion to question the correctness of some of these views, we must admit them to have been for the most part ingenious and original. Some of the views of Fichtè, in his juridical treatise, we have already noticed, and may afterwards have occasion to revert to them.

Among the great modern restorers, and improvers of the study, of the Roman law, in Germany, such as Hugo, Haubold, Mackeldey Thibaut and Savigny, Professor Hugo had certainly, also, the further, and great merit, if not of originally suggesting, at least of successfully introducing into general practice, and powerfully promoting in that country, the study of the philosophy of positive law. But notwithstanding his accurate and enlightened views in other respects, that eminent jurist appears, from his having devoted himself, in early life, to the cultivation of the Roman law, from his great success in the historical development of that law, and from the admiration naturally felt for a favourite object of study, not to have remarked with his usual acuteness, the objections, to which the Roman tri-partite division of the constituent parts of private law, is liable. Nay, he actually sanctioned this division by his authority. And the chief, if not the only improvement, made upon this general tri-partite division, by him, and Mackeldey, appears to be the separate consideration of the family relations, and of inheritance or succession, as affecting real rights. Savigny again appears to have devoted himself, more, to tracing the historical progress, and the natural development of private law, than to the classification of its component parts.

It only remains to inquire how far the classification

of the objects of private law has been improved by the modern analytical school. And here we have chiefly, if not entirely, to consult the works of Mr. Bentham, and his translator Dumont. For although the historical school of Germany has lately had a vigorous philosophic assailant in M. Gans of Berlin, the disciple of the philosopher Hegel, in his work on the law of succession, and its development in the history of the world, it rather appears, that ingenious and powerful writer, although perfectly right, as we have formerly seen, in maintaining the propriety, and advantage, of uniting philosophy, with history, in the cultivation of law, as a science, has erred in adapting facts to his preconceived theory, and has not materially contributed to extend the boundaries of juridical knowledge, by sound deductions from observation and experience.

The classification by Mr Bentham, of the constituent parts of private law, is contained in the *Traitès de Legislation* first published in 1802, particularly in the *Vue Generale d'un Corps Complet de Legislation*, and in the *Principes du Code Civil, et du Code Penal*, and in the recent English edition of his works, Part I. p. 81–168, Part II. and Part IX. p. 156–210. And here we willingly recognise the great merits and advantages of his exhaustive and discriminative analysis in Penal law, of his divisions and subdivisions of offences, perhaps more minute, than actual practice requires, and of his calculations and estimates of their effects upon the community, with a view to the apportionment of adequately preventive punishments. Even to the student of positive criminal law, with a view to practice merely, this analysis must be of great use, in enabling him to take enlarged, and at the same time, correct and distinct views. And it must be of still higher importance, to the statesman, or legislator, whose object is the improvement of existing criminal laws. Indeed its oper-

ation may be traced in the recent improvement of the criminal law of England.

But while we thus cordially acknowledge the great services Mr Bentham has rendered to the science of law, in the Penal or Criminal department, we do not think, he has been happy in his general plan of a Civil code, any more, than, as we had formerly occasion to observe, in his exposition of the origin and formation, and of the general divisions of law. According to him, the general titles of a Civil code should be ten: of things,—of places,—of times,—of services,—of obligations,—of rights,—of investitive and divestitive events,—of contracts, and the division of them,—of the domestic and civil states,—of persons capable of acquiring and contracting.

Now, independently of this arrangement being liable to the objection urged by Leibnitz, against the Roman division of the constituent parts of law, into persons and things, the preceding enumeration presents rather an undigested mass of matters. Indeed, Dumont informs us, that Bentham himself regarded his General View of a Complete Code of Laws only as a sketch for his own guidance, and as too little developed, to be offered to the public. Accordingly we do not find in it, the exhaustive analysis, or orderly disposition, which characterise Bentham's more minute arrangements. We do not find, the general, distinguished from the particular, or the latter, arranged under the former. We do not find, the co-ordinate, sufficiently distinguished from the subordinate, or opposed to each other, so as to show the subject of division is exhausted. We do not even find, the accessory and occasional, sufficiently distinguished from the principal, and the permanent. All things, of course, exist, or happen, in space and time; and things, times, and places, certainly, require incidental discussion, in a code of laws. But,

such incidental discussions may, manifestly, be more regularly, and more conveniently introduced, under the legal doctrines, with which they are immediately connected.

In his *Principes du Code Civil*, however, Bentham apparently, on farther reflection, and in correction of his error, excludes services, which in his *Vue Generale d'un Corps Complet de Legislation*, he had brought forward, as co-ordinate with rights and obligations, and very properly reduces the constituent parts of law, to the two classes last mentioned. Proceeding, then, on the gratuitous assumption, of a legislator, invested with the requisite power, distributing those rights and obligations, among individuals, he states, the welfare of the community, as is admitted on all hands, to be the grand object of civil law; and representing that welfare, as composed of four branches, subsistence, abundance, equality, and security, including security of person, and property, he devotes the first part of the Treatise, to the discussion, and illustration, of these topics. In the second part, he commences, with the constituent titles of property; and then treats of the modes of acquiring property by consent, by intestate succession, by testamentary disposition. He next treats of rights, to what, he calls, services, as a new element, which he seems to think, has been omitted in all former codes of law, but which correspond with prestations in the Roman law, and are neither more nor less, than the useful actions performed by individuals, for the behoof of other individuals; and illustrates the different modes of acquiring such rights to services, by paction, or convention, or otherwise. And he concludes, with the communion of property, moveable and immoveable, and the distribution of loss. In the third part he discusses the rights and obligations, which the law, ought to attach to the different private states, or conditions, of indivi-

duals in society, viz., of master and servant, of guardian and ward, of father and children, of husband and wife. And in the detail of these principles of the Civil code, which contain many original and profound views, Bentham has certainly been more successful, than in his general arrangement of titles, in the *Corps Complet de Legislation.*

CHAPTER VIII.

SKETCH OF A GENERAL CLASSIFICATION OF THE CONSTITUENT PARTS OF THE PRIVATE LAW OF A NATION.

HAVING thus taken a retrospective view of the principal general classifications, which have hitherto been adopted, or proposed, of the constituent parts of private law, we shall now endeavour to give a sketch of a classification, which may perhaps combine the advantages of those before enumerated, without their defects.

The order, says Professor Hugo, in which the individual, or particular, doctrines, of a body of private law, should follow each other, depends upon their positive nature; as the latter, again, may be more nearly determined through the former. There is, thus, given, no order, which would be alike, or equally, good, for every body of positive law. And, alluding to the Roman law, he adds, the order of that body of positive law, which has been the most cultivated and improved, and which has been most imitated, and assumed by us as a model, here well deserves the preference.* But although it would be folly, to attempt forcibly to introduce the order of one system of positive law, into another, already established system of positive law, where they are materially different, and although there may be no order, which would be equally good, for every

* Lehrbuch des Naturrechts als einer Philosophie des Positiven Rechts. § 152. Berlin, 1819.

system of positive law, there certainly exists, in the constitution of man, and in the circumstances, in which he is placed on this globe, such an established order, as may be traced by human intellect, and may render one legal classification, more correct and complete, and more convenient, than another.

In tracing the distinction between coercive law and morality, and in afterwards explaining the intimate connexion between private or individual, and public or constitutional law, we assumed, that the latter, the constitution, and administration of the government, exercising the power of the community, had attained such a degree of improvement, as to recognise and establish, that condition of civil liberty, among the members of the state, in relation to each other, in which each individual enjoys, or may enforce his legal rights, and fulfils, or may be compelled to fulfil, his legal duties. We have likewise already seen, that an exposition of the particular rules, which compose the aggregate, denominated private coercive law, is identical with an exposition of the rights and obligations, which the law recognises, and enforces, among the different descriptions of individuals, living in society, and having intercourse with each other, whose external actions it regulates. And, it is, therefore, chiefly, if not entirely, in the differences, which may be found to exist, among these rights and obligations, that we are to search for the grounds of all the divisions, and subdivisions of the science.

Now, rights and obligations are manifestly the attributes of persons, not of things. And to divide rights, like Judge Blackstone, into the rights of persons, and the rights of things, if by the latter words are meant rights, not over, in or to, but, belonging to or inherent, and vested, in things, we have seen, either evinces inaccuracy of thought, or is at best a misapplication of

language. Again, rights and obligations are not merely the attributes of persons singly: they presuppose and exist only in reference to other persons. A single man, existing on the surface of this earth, would have certain physical powers over external things, but no legal rights.

But, although rights and obligations are, in reality, and correctly, the relations of individual persons, to other individuals, they are plainly correlative terms. And it is manifest, in the first place, that they may exist between any one individual, or a definite number of individuals, and all other individuals generally, and indefinitely; the right being positive against all others, *adversus omnes*, and the obligation on all others being only negative. Or, they may exist between particular individuals, and instead of being *adversus omnes*, directed against all other individuals indefinitely, may exist or be directed only against one, or more, particular individuals, who are under a corresponding obligation, not merely negative not to interfere, but positive to do, or bear, or suffer something for the behoof of the person having the right. Secondly, It is manifest, these relations of right, and obligation, among individuals, may be of a permanent nature, or only occasional, and temporary. Thirdly, It is manifest, these relations of right and obligation may have for their subject, or bear reference (1st) to the person and actions of the individuals having the right, or (2d) to external material substances or things, with which individuals may form an immediate and direct connexion, and over which they may have a power of disposal; or (3d) to the persons and actions, or instrumentality of other individuals. And without further investigation, these obvious differences, in the legal relations of individuals, appear to afford a sufficient basis for a tolerably scientific arrangement of the constituent parts of private law.

Section First.

General Personal Rights, or Rights relative to the person and actions of the individual having the right, directed against all other individuals indefinitely, and usually inferring only a negative obligation.

In the first place, the legal relation between one individual and all other individuals indefinitely, may have for its subject the person and actions of that individual. And we have here the primary right of the individual to the substances, and qualities or attributes, corporeal and mental, which constitute him a man, and render him capable of being a member of a community or state, and of the enjoyment of, and subjection to, legal rights and obligations. This class of rights obviously embraces the safety and integrity of the material frame, with which the immaterial substance, or mind, is in this life combined, or intimately connected; which right, however, figures not so much in Civil, as in Penal law, not so much in its exercise, as in its violation, in the shape of offences against the person. This class includes, also, the exercise by the individual of all the faculties and functions of his mind and body, in the suitable adaptation of his body, for the attainment of the purposes, conducive to his welfare, and in the acquisition of knowledge, skill, and habits of activity, to operate upon things in the external world, and convert them to his use, so far as consistent with the similar exercise of such faculties and functions, by other individuals, and so far as compatible with the conditions, and restraints, found necessary for the maintenance of reciprocal freedom in their external actions, among men living in a community or state.

So far as regards the corporeal frame, or material part of the human being, this right might perhaps be called real, or material in the strongest sense of real right. So far as regards the actions of the individual having the right, and the negative obligation of non-interference incumbent on all other individuals indefinitely, the right might perhaps more properly be termed personal, though *adversus omnes*. But as the subjects of this class of right, are the body and mind of the individual having the right, and the exercise of their respective functions, constituting, what is usually denominated his person, it will be more consistent with ordinary language, from which that of law should deviate as little, as practicable, to designate these rights, as general personal or individual rights, and to confine the term real rights, to things, extraneous to, and distinct from the persons, either of the individual having the right, or of the individuals subject to the corresponding obligation.

Section Second.

Real Rights, or Rights to, or in External Substances, or Things; directed against all other individuals indefinitely, and involving a negative obligation.

In the second place, the legal relation between one individual, or a determinate number of individuals, and all other individuals, indefinitely, *(adversus omnes,)* may have for its subject, external material substances, or things, so far as placed under the power of man. Upon his entrance into this world, man becomes dependant for his continued existence, and welfare, not merely, upon the atmosphere, with which he is surrounded, or other material substances of inexhaustible use, but upon various other substances, vegetable and animal, which do not exist in such abundance, and are yet requisite,

for the growth and support of his corporeal frame. And there seems to be a propriety, in departing so far, from the hitherto generally adopted arrangements, as to begin, as Kant has done, not with the relations of family, but first, as already done, with the legal power of the individual over his own person and actions, as against all other individuals indefinitely, and then with this connexion, between one individual, or determinate number of individuals, and external material substances, as against all other individuals indefinitely. For, the necessity of this connexion with external substances for their animal existence, and for the supply, and gratification, of their other various wants and desires, is imperatively felt by all individuals without exception, and forms one of the great causes of their industry, and intercourse in life. Indeed, the greater part of the mere legal obligations, which exist among men, are of importance, only, because they affect the things, by means of which life is preserved, or rendered comfortable. If, for instance, we are occupied with the reciprocal legal obligations, which result from the matrimonial connexion, whether with reference to the spouses, the parents, or the children, we find the question is almost always, about the means of subsistence. And this connexion with external things, is, thus, presupposed, and assumed; and the consideration of it is involved in the discussion, of most of the other rights of individuals, which have for their subject, the persons, or actions, of other individuals.

Now, the physical possession, use, and disposal, of external substances, whether moveable or immoveable, may either be in common with other individuals, generally; or by one individual solely, or by a determinate number of individuals only, to the exclusion of all other individuals generally. And we have thus on the one hand, the right of common possession, use, or enjoyment

of all those external material substances, which exist in such abundance, as to be inexhaustible, or which otherwise admit of such common possession, use, and enjoyment; and on the other, the right of exclusive possession, use, and disposal, of external substances, so far as they admit thereof.

Property, sole, or in common.

This direct, and immediate, connexion with, and power over, external substances, with reference to the possession, use, and disposal, of which they are susceptible, to the exclusion of all other individuals, has been denominated property. And this right may be either vested in one individual solely, to the exclusion of all others, or it may be vested in a determinate number of individuals, to the exclusion of all others,—in which last case, the subject of the right of property, is held in common, by the limited number of individuals, in whom it is vested; and thus arise the distinctions of part owners, and joint owners, of proprietors *pro diviso*, and *pro indiviso*.

Inferior Real Rights.

Farther, this right of property may be limited and divided, not merely, by its being vested in more, than one individual, but also by the separate powers of possession, use, and enjoyment, simultaneous, or in succession, of acquisition, retention, recovery, and disposal generally, which compose this direct and immediate connexion with, and general power over, external substances, and which are involved in the idea of property, being vested in different individuals. Hence the various limited rights of usufruct, liferent, estate for life, estates in remainder, absolute and contingent, right of inheritance, mortgage, or security over land, agricultural,

mining and building leases, servitudes, rural and urban, hypothec, lien, pledge. All such limitations of the absolute right of property, are correctly denominated real rights, as being the legal relations of certain individuals, among themselves, to the exclusion of all other individuals, having for their subject-matter, certain external substances, or things. And, although such inferior real rights may not admit of an exhaustive analysis, we shall afterwards have occasion to see, they admit of an inductive enumeration from the experience of nations, as satisfactory, at least, as the chemical enumeration of alkalis, acids, earths, and metals.

Section Third.

Particular Personal Rights.

But, besides external things, the legal relations of individuals may have for their subject the persons, or the actions, of other individuals. And these rights may, perhaps, along with the right of the individual to his own person, and the exercise of its faculties and functions, be denominated, with sufficient accuracy, personal rights, as distinguished from real rights, and as constituting with the latter, the two grand divisions of rights in private law. Among ancient nations, indeed, and even among some modern Christian nations, who boast of their civil liberty, there existed and still exists, what has been denominated a real right over the person of a human being, considered merely as a thing. But such an exercise of power, was, and is, a perversion of all right, and has happily been abolished in the colonies of Great Britain, and appears to be in the progress of abolition among all civilized nations; so as to leave merely, in private law, the personal right which one individual may have, to the actions, the labour, the services, or, in the language

of the Roman lawyers,—the *operæ* or *prestationes* of another individual. The metaphysical acumen of Kant, indeed, has as we have seen, discovered and recognised a third division of rights, namely, personal rights in a real mode, as consisting in the possession of an external object as a thing, and in the use of it, as a person. And under these he places marriage, and all the relations of the domestic society. But, although the persons of other individuals be, no doubt, physically external substances, there seems to be no sufficient ground for viewing the conjugal connexion, or parental discipline, as matters of real right, or otherwise, than as rights resulting from these permanent domestic relations.

Holding then, rights to be divided into the two great classes of real, and personal rights, and proceeding to the arrangement of the latter, we find these legal relations may exist between one or more particular individuals, and other particular individuals, and may be permanent or durable, or may be merely occasional, transient, or temporary. And for similar reasons to those, which induced us to place property, and other real rights, before particular personal rights, we shall consider first those personal rights, which arise from the mere occasional and temporary relations of one, or more individuals to other individuals; partly because in the intercourse of human life, among the members of a civilized community, these occasional relations, exceed by much, in number, and variety, the more permanent relations; but chiefly, because the former are, in a great measure, presupposed, and involved, in the consideration and discussion of the latter.

I.—*Personal Rights against particular individuals, involving positive obligations, and arising from occasional and temporary legal relations.*

The subjects of these occasional and temporary legal relations, are, we have seen, the persons or actions, of other individuals; and they may arise, first from the legal acts of one, or of more individuals, such as promises, services rendered, contracts, covenants, or agreements; or secondly, from the illegal acts of one or of more individuals, causing loss or damage to other individuals; or thirdly, from particular circumstances, in which individuals may be placed in relation to each other, without any act on their part.

1.—*Personal Rights from occasional or temporary relations, arising from the legal acts of individuals, unilateral promises, bilateral contracts.*

The legal acts of individuals giving rise to personal rights and obligations of an occasional or temporary nature, may, obviously, be either unilateral, involving the express consent of only one party, or bilateral, involving the consent of two or more individuals. To the former class belong promises, where there is no counter stipulation or undertaking, offers prior to acceptance, prestations, or services, unauthorized, but entitling to reimbursement, and perhaps remuneration, such as the *negotiorum gestio* of the Romans, salvage, and so on. To the latter class belong the vast number and variety of contracts, covenants, and agreements. We shall afterwards see, that neither the form, nor mode, of entering into contracts, nor their tendency, as beneficial or onerous, nor the degree, or amount, of the interest of the parties thereto, afford a good principle of division; and that

the subject-matter of contracts appears to be the best source of such a division, and to present the clearest data for a scientific arrangement of them. Thus contracts, like all rights and obligations, relate either to external substances or things, or to the persons and actions of other individuals. Contracts relative to things, may concern either the acquisition, disposal, and transference of the property of these things, such as barter, purchase and sale, and exchange of circulating medium, or to the possession, use and enjoyment of these things, distinct from the property, such as agricultural and urban leases, loan at interest, &c., or to the mere possession or custody of these things for preservation, such as deposit, storeage, wharfage, or to the mere detention of these things, as a security for the fulfilment of other obligations, such as pledge, mortgage, and lien. In contracts, again, relative to the actions and persons of individuals, the actions to be performed, as contracted for, the prestations or services, may either affect the corporeal frame, such as surgical operation, medical advice and prescription, and menial services, or they may affect the mental constitution, such as education, religious and moral instruction, instruction in art and science, legal advice and assistance ; or they may be performed with reference to, or exerted upon, mechanical substances, such as mercantile commission, and agency generally, such as the operations of the manufacturer, artificer, painter, sculptor ; or they may relate to the delivery of certain things, or to certain other prestations, in certain contingent events, such as insurance or indemnity against the perils of the sea, against fire, against war risks, &c. Further, contracts may be either principal, or merely accessory, and auxiliary, securing the execution of other contracts, such as bonds of corroboration, suretyship, and mercantile guarantees.

2.—Personal Rights from occasional or temporary legal relations, arising from the illegal acts of individuals.

The illegal acts of individuals giving rise to personal rights and obligations of an occasional or temporary nature, are all breaches, invasions, or infringements, of legal rights, real or personal. And the object and measure of these rights and obligations, are, restitution of the thing withdrawn, or, if restitution be impracticable, the prestation of an equivalent—reparation for damage done, or deterioration occasioned to things moveable, or immoveable; reparation for other loss or damage, occasioned by breach of contract, or failure to perform, or by damage to the persons of individuals, or by invasion of the rights enjoyed by them, from their permanent relations in society.

3.—Personal Rights from occasional or temporary legal relations, arising from circumstances and events, without any act on the part of the individuals.

Personal rights and obligations of an occasional or temporary nature, may arise from the particular circumstances, in which individuals may be placed, accidentally, in relation to each other, or from events, which may have occurred, affecting such individuals, without any act on their part, immediate or remote; such as the obligation to bear one's proportion of a common loss, to bear one's proportion of unauthorized expenditure, for common benefit, or for the prevention of farther loss.

II.—*Personal Rights against particular individuals, involving positive obligations, and arising from permanent relations.*

1.—*Relations of Family and Kindred.*

Among the permanent legal relations of particular individuals, to other particular individuals, we have first, those, which arise from the mode, in which the human being is procreated, and the human race propagated and continued on earth, namely, the relations of male and female, and of parent and child; the relations created by marriage, namely, husband and wife, parent and child legitimate, commonly called the family or domestic relations; and the relations of kindred generally, through its various degrees, direct and collateral, with reference to the subsistence, education, and intercourse in life, of such individuals. This class of legal relations, composes, and is generally denominated, the *status familiaris*, or domestic state or condition.

2.—*Succession, Intestate, and Testate.*

A second class of permanent legal relations, of individuals to individuals, arises from the mode, in which, on this earth, while the human species is propagated and continued, the individual, after the lapse of a certain number of years, passes to another state of existence, and leaves unoccupied, to be assumed by others, the various real and personal rights, which may have belonged to him, and which have not expired with him; namely, the relations of the living to the dead, with regard to the rights so left unoccupied, as determined either by the degrees of kindred, as recognised by the consuetudinary or statutory law of the community, or

by the will of the deceased proprietor, or holder of the right; namely, the relations of ancestor and heir, executor or legatee, the rights of inheritance, or of succession, testate and intestate, to real rights in or to things, immoveable, or moveable, or to personal rights.

3.—*Relations of Guardian, and Ward, Tutor or Curator, and Minor.*

Among the relations of particular individuals to particular individuals of a permanent nature, at least of considerable duration, we have, also, those, which arise from the mode, in which the human being is procreated, passes through infancy, and youth, to mature age, and from manhood, through old age, to death; and from the mode in which the human being is produced, entire or defective, either in mind or body; namely, the relations of guardian and ward, tutor or curator, and pupil or minor, *curator bonis* or trustee.

4.—*Relations of the Social State.*

Farther, we have the permanent and more general, but still individual or private legal relation, which arises from the congregation of men, into communities, and takes place among individuals living in the same community, national, provincial, or municipal, but with regard to each other solely. This legal relation has sometimes been called *status civilis*, or *status civitatis*; and even in private law, this appellation may be sufficiently correct, as applicable to the permanent rights of an individual, against the other members of the community, as such, provided the idea of relation to the state or government, the criterion of public law, be not thereby conveyed. But, perhaps, a more appropriate appellation may be *status socialis*, the social state or condition; inferring

a negative obligation on all the other members of the community, to respect, and not to interfere with the possession or enjoyment, by the individual having the right, of the advantages of that state, as arising from the social union, and consisting in the favourable opinion and good will of others, in reputation and character, or otherwise.

5.—*Relations of Master and Servant, &c.*

Finally, among the comparatively permanent relations of individuals to each other, we have these, which arise from the differences that naturally, and almost necessarily, take place, in the progress of society, in the relative wealth, rank, and occupation of individuals, such as master and servant, or operative labourer, the various professions and trades, learned and mechanical, and the landed or agricultural, commercial, and manufacturing interests; without including any of the legal relations, constituting the public or constitutional law, as between the state or government, and the individuals of whom the community is composed; which, of course, are extraneous to a classification of the component parts of private law.

Section Fourth.

Classification of Constituent parts of Private Penal Law.

Under the preceding general heads of distinction among rights and obligations, all matters of mere private civil law appear naturally to fall, and to be conveniently comprehended. And so must, also, all matters of private, criminal, or penal, law; crimes, offences or delinquencies, against individuals, as such, being nothing else,

than the invasion, violation, or infringement, of such rights and obligations.

Thus to the right of the individual *adversus omnes*, to the conservation and free use of all the functions of his corporeal frame, correspond the large class of crimes, and offences against the person. To the real right of property, and to the various other subordinate real rights, arising from its modifications, and limitations, correspond the still larger class of offences against property generally. To personal rights arising from occasional, and temporary relations, there do not appear to be any corresponding positive offences, seeing there is here merely the negative failure to perform ; unless the party, under the personal obligation, not merely fails to perform, but commits such a positive illegal act, for instance, practises such gross fraud, and deception, as to justify, and require, the attachment of penal consequences, for the protection of the community. To the rights from the permanent relations, among individuals, which constitute the domestic state, or condition of family, and kindred, correspond the offences against that condition. To the breach of the duties of guardian, tutor, and curator, penalties also attach. And to the right of the individual against others, to reputation, or to a negatively just estimate of character and conduct, by his neighbours, or the other members of the community, as exhibited in external action, correspond the offences of slander and defamation.

In the classification of rights and obligations, as the objects of private civil law, we have thus, at the same time, obtained a classification of the objects of private penal law, as being nothing else, than the violations of the rights so classified, or in other words, crimes or offences. And when, in our future inquiries, we come to examine the subdivisions of rights and obligations, and their relations in detail, we shall find, that after the

ascertainment and description of these violations, or offences, the great object of penal law, is, to ascertain the degree and amount of mischief, resulting from these offences, to other individuals, or to the community at large, and to devise such penal consequences, as may be adequate to repress and diminish, if not entirely to prevent, the evil in future, without throwing any unnecessary constraint upon individuals of innocent intentions, and without subjecting even the guilty to more severe discipline, or suffering, than is requisite for the security of the public, and their own reformation.

CHAPTER IX.

BY WHAT MEANS, AND TO WHAT EXTENT, MAY THE PRIVATE LAW OF A NATION BE EFFECTUALLY IMPROVED?

HAVING thus viewed the grand divisions of the internal private law of a nation, according to its sources or mode of accumulation, into consuetudinary and statutory, according to its subject-matter, into rights and obligations, and according to the mode of enforcing these rights and obligations, into civil and criminal; and having also arranged generally these rights and obligations, according to the distinctions found, in fact, to exist among them, and the violations of the different classes of them, with reference to the penal consequences attached for the purpose of preventing or diminishing, the recurrence, or occurrence, of such violations or offences, we should next proceed to consider historically, and analytically, the subdivisions of the science.

But before entering into these details, we may shortly inquire by what means, and to what extent, the private law of a nation, such as we have just described, may be most effectually improved.

This, of course, involves the question which has now, for a good many years, formed the grand subject of contention between the two rival schools of law, and which Mr Bentham has designated by the rather awkward appellation of codification. And divesting ourselves of all party zeal as disputants, and considering the subject calmly and dispassionately, we may probably

find, that, in the practical view, we are now taking, of the means of improving the existing positive private law of a state, as well as in the view we formerly took, of the cultivation of law as a science, the truth lies between the two extreme positions, assumed by the contending parties, and that the wisest course is a discriminative eclecticism.

It is impossible, not to sympathize with, and admire, the noble struggle made by Professor Savigny and his disciples, in support of their native legislation against the attempt of the French Emperor, to obtrude the code Napoleon upon the German nation. And it would manifestly be a foolish and futile measure, on the part of any government, to attempt to introduce, establish, and enforce, among its people or subjects, all at once, and without regard to previous habits and customs, and existing institutions, even what has been, or may be, called, a complete body of private law, that is, deduced from, and formed upon the long-continued, and extensive, experience, of an enlightened foreign people. If the people, among whom the code, formed upon the model of the law of a foreign nation, is to be established, happen to be in a different stage, or to have attained a less degree, of civilization, a great part of the new code will obviously be unsuitable, or superfluous. If the two nations have attained nearly the same degree of civilization, it is not likely, that any code, formed entirely upon the private law of the one, will be superior to the existing law of the other. And the difficulties to be encountered, in either sweeping away the old customs and institutions, or in uniting and amalgamating the new with the old, joined with the natural pride and jealousy of foreign control, even in the way of example, inherent in independent nations, appears to render such a project, hopeless, and impracticable.

That, among a people, considerably advanced in agri-

culture, manufactures, and commerce, the private law may, in all its parts, civil, as well as criminal, be so simplified, and so reduced in bulk, as to be made accessible, and rendered familiar, to all the members of the community, appears also to be a vain scheme, which can never be realized. Even the private law of a state is one of the most difficult arts and sciences, which men have to learn, or to practise. The principle of the division of labour operates in civil society, with nearly as great certainty, as that of gravitation in the material world. It operates in private law, as well as in theology, medicine, merchandise and manufactures. In times past, among all civilized nations, it has been found necessary and expedient, that a certain portion of the community should devote themselves to the study of law; and such is likely to be the case in all future ages, while man continues on earth, such a being, as he is at present.

But to perceive, distinctly, what are the really practicable means of improving the private law of a nation, and to what extent that improvement may reasonably be expected to be carried, we must revert to the sources of that law, and to the mode, in which it has grown up, and been gradually formed and accumulated. The compulsory power of the community, over the members, of which it is composed, we had occasion to observe, in tracing the growth of private law, can only be exercised in two ways; namely, either by prescribing *a priori* general rules for the conduct of individuals in future, or by determining *a posteriori*, disputed consuetudinary rights; and by awarding suitable penal consequences to the violation of these rules and rights. We have also had occasion to observe, that the result of the former exercise of power, namely, the statute law, among all civilized nations, bears, from causes before explained, a very small proportion to the result of the latter exercise

of power, as sanctioning, disapproving, or amending the modes of action, which have grown up from custom, or have previously prevailed. And we now proceed to trace more minutely, the usual mode, in which the statute law, and the common, or consuetudinary law, in matters of private right, have been extended and improved among nations, as they advanced in civilization.

In the department of the statute law, extensive improvements have, from time to time, taken place, by the direct interposition of the legislature; and though not so frequently, in private law, as in matters of state expediency, provision is thus made for the judicial determination of whole classes of future cases. The value of such statutes is, of course, dependent on the experience, foresight, and wisdom, of the legislative body; upon the nature of its constitution; and upon the mode of proceeding it adopts, in framing its enactments. Further, without any new legislative interference, new cases, although they do not fall under the express terms of the existing enactment, may be of such a similar, or analogous, description, as to afford reasonable grounds for inferring, they were in the contemplation of the legislature, in passing the statute. And, if so, the judge proceeds to inquire into the time, and circumstances, in which the enactment was framed, to ascertain, as far as he can, what were the views of the legislature in framing it; and thence to determine, whether the question may not, according to the rules of sound, and salutary, construction, be held to be comprehended within the spirit, or scope, of the statute, though not within the express words employed by the legislature.

In the department of the common law, again, the process seems to be more varied. Among all rude nations, we have seen, certain modes and habits of action, certain usages and customs, arising from the

corporeal and mental constitution of mankind, and from the physical circumstances, in which they happen to be placed, grow up, in the course of time, before the establishment of regular judicial tribunals. And this primary consuetudinary branch of the common law, founded on almost immemorial usage, it becomes the duty of judges to enforce, upon obvious grounds of expediency. To this branch of the common law, Lord Bacon alludes, when he talks of, Leges pro jure communi receptæ, quæ tanquam immemoriales sunt in origine suâ; and De consuetudine, quæ legis species est, deque exemplis, quæ per frequentem usum, in consuetudinem transierunt, tanquam legem tacitam.—*De Aug. Scient.* Lib. VIII. C. III. Aph. 61 and 21.

Another, and the chief source of the common law, is the judicial determinations of those tribunals, which, in the progress of civilization, are established among all nations, for the administration of justice among individuals. Lex enim (observes Lord Bacon) non sufficit casibus: sed ad ea, quæ plerumque accidunt, aptatur; sapientissima, autem, res tempus, et novorum casuum quotidie auctor et inventor; and hence, Curiæ et jurisdictiones, quæ statuunt, ex arbitrio boni viri, et discretione sanâ, ubi legis norma deficit.—*De Aug. Scient.* Lib. VIII. C. III. Aph. 32.

In ascertaining, what descriptions of actions, ought to be prohibited, and what enforced by such sanctions, as are placed at their disposal, judges, independently of the established usage just alluded to, seem in the more early stages of society, to proceed mainly upon two considerations; what appears to be just and reciprocal, between, or among, individuals; and what appears to be most expedient, as a general rule of practice; in other words, they decide *secundum æquum et bonum.*

In the more simple of the relations, which arise in the progress of civil society, among men, as capable of

affecting each other's welfare, the rights and obligations of individuals, in other words, what it is just and expedient, to protect, against invasion, by the terror of punishment, or to enforce by the compulsory transference of property, or deprivation of personal liberty, are early and easily perceived. But, in the more complex relations, and varied combinations of circumstances, which arise in the course of physical events, and of the multifarious transactions and enterprises, in which mankind engage, in the more advanced periods of civilization, the line of legal duty is not so immediately discerned. In this, as in other departments of human knowledge, the mind, from the limited nature of its faculties, may be obliged, in investigating the relations of agents, or actions, denoted by the general terms, justice, reciprocity, or general expediency, to observe, to analyze, and compare; and may be reduced to the necessity of passing through a series of consecutive propositions, all arising out of each other, and of arriving at the truth, only by the successive links of a long chain of reasoning. And it is very often one of the nicest, and most difficult, operations, of the intellect, to trace the grounds for the decision of a complicated case, to those principles of justice, reciprocity, and general expediency, which are comparatively so simple, and obvious, as to command general, if not universal, assent.

A third, and a distinct, source of the common law, seems to arise, in the progress of society, out of those already mentioned. The grand obligation incumbent on courts of law, *stare decisis*, to determine all subsequent similar cases in conformity with those already decided, is universally admitted. But a new case, although it may not be completely parallel, in all points, to any case already decided, may have a more or less strong, resemblance, in part, indirectly, or in certain views, or circumstances, and may fall under a principle or rule, more or less

general, upon which the courts proceeded, in the determination of previous cases. For, although it may be the proper duty of courts of justice only to decide particular cases, not to prescribe general rules of law, they would ill have discharged that duty, if they had not endeavoured, to find reasons for their judgments, if they had not examined and compared the transactions, and questions, which successively came before them, discriminated the grounds, upon which similar, or different, judgments, might be just and generally expedient, and thus deduced, and expounded in particular decisions, certain common, or general principles, for the instruction, and direction of themselves, and of succeeding judges. In this way, a great number and variety, of the rules of the common law, *regulæ juris*, have been gradually unfolded, in the progress of time, and as occasion required, and have come to be recognised, and promulgated. And the extension and application, of these general principles, to new, and so far different, but also so far similar, or analogous, cases, appears to have been held, in all civilized countries, within the legitimate province of the judge. Ad certitudinem legum, facit, (si quid aliud,) says Lord Bacon, tractatus bonus et diligens de diversis regulis juris.—Colligendæ, autem, sunt regulæ, non tantum notæ et vulgatæ, sed et aliæ, magis subtiles et reconditæ, quæ ex legum, et rerum judicatarum, harmoniâ, extrahi possint—suntque dictamina generalia rationis, quæ, per materias legis diversas, percurrunt, et sunt tanquam saburra juris.—*De Aug. Scient.* Lib. VIII. C. III. Aph. 82.

But, in the progress of civilization, new combinations of circumstances, and events, give rise to questions, which are neither comprehended within the scope or spirit of the statute law, nor bear even such a limited resemblance, or analogy, to previously adjudged cases, as to admit of the application of the *regulæ Juris*, or

common, or general principles, by which these cases have been determined. The judge, of course, must proceed to decide the question; and he must do so, not according to his peculiar conception of what is right or wrong, not according to his own discretion, or in an arbitrary manner, but according to the common law. Still, however, whether the grounds of decision be perceived, almost intuitively, or only after a long process of reasoning, the object and result of the inquiry, seems always to be, either what is consistent with the rules expressly enacted by the legislature, or already recognised in the judgments of our courts, or, in the absence of such guides, what appears to be reciprocally just, as between individuals, in the particular circumstances, or generally expedient, as a precedent, or rule of practice. Such, at least, seems to be the mode, in which the common law, as distinguished from the statute law, was originally formed, and has gradually grown up, and been accumulated in civilized countries. And such, independently of prospective legislative interference, appears, also to be the mode, in which it must continue to be cultivated, and expounded, in those new cases, to which neither the enactments of the legislature, nor the rules already recognised by judicial determinations, may be applicable.

The admission, that judges may thus occasionally be guided, in their decisions, by views of justice, reciprocity, and general expediency, may perhaps excite surprise, and may appear to bestow upon judges, a greater latitude of discretion, than what they ought to possess; such as may lead to arbitrary conduct, and prove dangerous to the community. To establish general enactments, for regulating the conduct of all the individuals, of whom a nation is composed, or of particular classes of the community, upon views of general expediency, is undoubtedly the proper province of the legislature.

And such a proceeding, or attempt, on the part of any judge, or court of law, would be a gross usurpation. A judge cannot legislate; he can only pronounce the law. He is not entitled to set up against authority, and legal obligation, his private opinion of individual justice in particular cases. But, when the enactments of the legislature are silent, where there exists no judicial precedent, parallel or analogous, it seems to have been held allowable for the judge, in deciding particular cases, to proceed, in the exposition and construction of the law, upon those principles of natural justice, which are generally recognised, as the leading grounds of legal obligation, and agreeably to those rules, of which the tendency appears, upon the whole, to be most expedient. And that this has been done with most beneficial effects, in the country, where, of all others, in modern times, the judicial functions appear to have been best understood, and to have been exercised with the greatest ability and purity, a cursory perusal of the reports of the judgments of the English courts, for the last hundred years, will afford ample proofs.

Another auxiliary source of the common law, in the more advanced stages of its progress, is the general or local customs and usages, which, although they have not, like those formerly noticed, existed from time immemorial, or become inveterate, as a primary branch of the consuetudinary law, have gradually grown up, in the progress of the division of labour, and of the extension of trade and commerce, and have come to be observed, among particular classes of the community. When, for a series of years, individuals have been accustomed, in their mutual dealings, to act in a certain manner, the presumption is, that they have adopted the rule, from views of practical convenience; and, in general, the judge may safely give his sanction to the usage, and

enforce conformity to the rule. In most of the transactions, too, which constitute, what is called the business of private life, the parties neither foresee, nor provide for, all the events, which may occur, by express contracts, or arrangements, in spoken or written language. And, when the parties have not declared their meaning in express terms, the judge has no alternative, but to hold, by implication, that they intended to regulate the matter in dispute, upon the footing, upon which they had previously been accustomed to deal, or according to the general understanding, and prevailing usage, in such affairs.

Finally, in the exposition of the common law, judges have been accustomed to look to the legal systems, and judicial experience of other nations, if not as standards, or imperative sources of the law, at least as affording practical guides, by which they may be led to decide aright. The laws of other nations, of course, have no authority, or binding force, in any particular state. But lessons of true judicial wisdom may be derived from the experience of other nations, who have already run the career of civilization, or who, at least, have already advanced far in that career. Rules, which have stood the test of experience, in similar circumstances, are likely to prove salutary, though transplanted into another soil. And if the circumstances, in which the two nations are placed, be accurately compared, and discriminated, and cautiously weighed, there will be no risk of the adoption, of any incongruous and unsuitable regulations, while the study will enlighten the judge, and will lead to such modifications of the rules, as the particular situation of his countrymen, may warrant, or require.

To the gradual mode, in which the rules of the common, or consuetudinary, law, are thus evolved and

expounded, by the judges, various objections have been stated by speculative lawyers, and particularly by Mr Bentham.*

As the common law is confessedly not promulgated beforehand, in definite terms, like the statute law, and is only declared, from time to time, after the cases, requiring the application of it, have occurred, it has been objected, that it is in a great measure an *ex post facto* law; that in declaring, what the law is, as applicable to each particular case, which occurs, the judges are not tied down by certain definite rules, but are allowed to proceed upon certain general considerations of analogy, consistency, and expediency, and to exercise a latitude of discretion, which renders them, not merely expounders of the law, but in a great measure, legislators; and that, although by a fiction, the common law is held to leave no case unprovided for, it is often extremely difficult, to say beforehand, what the provision is. It has, also, been objected, that the common law, so far as fixed, is scattered over such a multiplicity of books of legal usage, and judicial determinations, as to be inaccessible, and in a great measure unknown, to the community at large; that the judges themselves frequently require long deliberations, and discussions, before they can venture to pronounce, what is the law, applicable to a particular case; and that it is unreasonable to subject an individual to loss, or inconvenience, for not regulating his conduct, conformably to a rule, which he could not know, until ascertained by this subtile, and laborious, process.

That certain difficulties, and inconveniences, attend the mode, in which the common law is unfolded, is so far true. And the public are under obligations to

* Papers relative to Codification, p. 30, &c. Supplement, p. 104, &c.

those ingenious men, who have suggested, what they conceive to be a sovereign remedy for this evil. But, whether the evil admits of a complete cure, is very questionable; an approximation to it, appears to be all, that is practicable. The inconveniences complained of, appear to arise, from defects and imperfections, not merely in the moral habits, but in the intellectual powers of man. And the plan proposed, of assimilating the mode of establishing, or declaring the common law, to the mode followed, in the enactment, and promulgation of statute law, will, it is apprehended, be found upon trial, to afford only a partial, and incomplete remedy.

For the charge, made by Mr Bentham, against the common private law of a nation, that it is an *ex post facto* law, there does not seem to be any real foundation. The relations of justice, reciprocity, and general expediency, with regard to particular modes of action, as between or among individuals, living together, as members of a community, obviously exist, altogether independent of the perceptions of these relations by mankind. And it seems rather absurd, to say, there is no law, unless, or until it has been imbodied, in so many words by the legislature. The duty of the judge, in expounding the common law, is, so far as not directed by legislative enactment, or prior judicial determination, to endeavour to discover, as far as he can, by observation, experience, and inductive reasoning, the relations just alluded to, as existing and already established, not by man, but by the Almighty Author of human nature. What it is just, and generally expedient, to enforce, particularly in complicated cases, man does not know, prior to experience; and Mr Bentham, himself, is forced to admit, that considerable judicial experience, even according to his own theory, is indispensably necessary, towards the formation of a code of laws, of any value.

Farther, independently of the practical difficulty, of attempting to establish any entirely new system of common law, different from what has been gradually formed, and grown up, with a people, however theoretically complete, the new code may appear to be, and independently of the inexpediency of such a degree of compulsion and force, as the establishment of such a new code would involve, it is manifest, from experience, that no such system of regulations, or abstract rules, which human wisdom is able to construct, can embrace all the cases, to which the greatly diversified, and complicated transactions of men, in civilized society, give birth. For, as Lord Bacon observes, "Angustia prudentiæ humanæ, casus omnes, quos tempus reperit, non potest capere."—*De Aug. Scient.* Lib. VIII. C. III. Aph. 10. Like the almost infinite diversity, which nature presents in the variegated tribes of the vegetable kingdom, or in the countenances of human beings, the combinations arising from physical events, and the arrangements of mankind in civilized society, are almost infinitely, or at least indefinitely, varied, and are constantly presenting new cases, which the most acute, and comprehensive, intellect, cannot foresee. Hence, even after such a systematic code, as that proposed by such speculative lawyers, had been established, it would still be necessary, to provide some mode of deciding these new, and unforeseen cases. And this mode, it does not appear, could vary much, from the plan hitherto adopted.

Nor would this proposed systematic code be defective, merely, in not embracing all new cases, it seems impracticable, also, from the unavoidable imperfection of human language, to frame the rules of the code, in such perspicuous terms, as to be free from all ambiguity, and doubt, in their application, even to cases, which are not properly, or strictly, new; and as to supersede the

necessity for any judicial discussion, in their application to such cases. Doubts, and difficulties, daily occur, in the construction and application of our present statutory enactments, even where they have been originally conceived, in language apparently simple, plain, and intelligible. And it does not appear, the conversion of the rules of our common law, into statutory enactments, would, by any means, exclude all ambiguity of construction, or operate as an effectual preventive of litigation.

It has been observed, too, and to a certain extent with truth, that the rights of the different classes of society, are, by no means stationary, but are almost constantly undergoing gradual changes; that the knowledge of their rights grows, and is extended, with the advancement of the nation in civilization; and that it seems, therefore, unwise to make that, a positive and permanent law to-day, which the progressive improvement of a people, may, at no distant period, show to be inconvenient, if not the reverse of salutary.

It has been, also, observed, and to a certain extent with truth, that as the legal relations of mankind become more complicated, in the progress of society, they require a particular study, like the other branches of human art or science; that the persons, who make these legal relations, their peculiar study, of course, acquire more knowledge on the subject, than other individuals, and become, in a manner, the depositaries of the law, and the living codes of the community; and that, as it is impossible for men, to make a perfect system of law, more than a perfect system of any other science, or art, it is better, to leave to the judicial establishments of a nation, and to the other functionaries of the law, who are constantly occupied in its study, the power of, from time to time, improving their decisions, and amending the practice of the law, than to rely entirely upon positive, permanent and unbending codes, which,

of course, can only contain the legal knowledge of the age, in which they are compiled.

In short, the chief, if not the only mode of improving the private common law of a country, and of making it keep pace with the progress of the people, in civilization, seems to be the establishment of good tribunals, whose independent judges, enlightened by the experience of former ages, and other nations, and combining the knowledge of legal principle, with an acquaintance with the habitual views and usages of their own people, can apply, with skill, the known and established rules, to the cases, which daily come before them; and, where these previously recognised rules may not be applicable, can find the grounds of their decision, in the constitution, circumstances, and habits of mankind, and regulate their judgments by the sound dictates of practical wisdom.

In the preceding observations, we have shortly traced the usual progress and development of the common or consuetudinary law among civilized nations. We have considered the chief objections to that branch of the law; we have seen, that some of these objections are not well founded in point of fact; that others of these objections are so far well founded, but arise from the limited nature of the human intellect, and do not appear to admit of any adequate remedy; and we have been led to conclude, that, upon the whole, the magnificent scheme of codification, rather ostentatiously brought forward, and so indefatigably urged, since the commencement of this century, will not realize, in practice, the immense advantages, held out as likely to flow from it, or prove, as expected by many, a panacea for all the evils and defects, of the private law of nations. But, although the expectations entertained, of the vast benefits, which will result from the adoption of what is called codification, appear to be quite extravagant, there can be no reason, why nations shall not aim at the attainment of such advan-

tages, as the adoption of such a measure, may fairly, and reasonably, be expected to secure. And we proceed with our inquiry, how far the conversion of consuetudinary, or judiciary law, into statute law, can be accomplished efficiently, and with beneficial consequences. For, again to refer to the authority of Lord Bacon, "Quod si Leges aliæ, super alias, accumulatæ, in tam vasta excreverint volumina, aut tantâ confusione laboraverint, ut eas de integro retractare, et in corpus sanum, et habile redigere, ex usu sit; id ante omnia agito; atque opus ejusmodi, opus heroicum esto; atque auctores talis operis, inter legislatores, et instauratores, rite, et merito, numerantor."—*De Aug. Scient.* Lib. VIII. C. III. Aph. 59.

The accumulation, not merely of the institutional works of private individuals, which, from the talents and experience of their authors, and from the lapse of time, have come to be received as authorities, but chiefly, of the repeated juridical determinations of their tribunals, has among most civilized nations, become vast, is yearly increasing, and will become, to all appearance, indefinite. The disadvantages of such an indefinite accumulation require no illustration; and if it cannot be prevented, all suitable means ought to be resorted to, in order to diminish it. Of these means, the chief, obviously, are arrangement, and classification. Law, as well as the other branches of human knowledge, is clearly susceptible of scientific arrangement, as we have already endeavoured to illustrate. And, by such arrangement, and classification, under national authority, of the different subjects of private law, with such amendments, as experience has suggested, there can be no doubt, the doctrines of the more ancient institutional writers, who have recorded the common law, as existing in usage, and who have come to be held as authorities, might be condensed, and that the long series of judicial de-

terminations, might be abridged in bulk, and reduced into a shape, much more adapted for facility of consultation.

Similar arrangements, and classifications, to what is now proposed, have, no doubt, as a matter of almost absolute necessity, with a view to practice, been made in various departments of the law, by private individuals, in treatises published from time to time. But such private treatises, however useful otherwise, do not supply the place of a national, or legislative arrangement of the law. They are usually confined to particular departments; and the classifications vary according to the views of each author. They have comparatively little authority of themselves; and must rest, almost entirely, upon the more ancient writers, or the judicial determinations, which they recite, or abridge. And no rule of judgment, adopted by the courts, as, at the time applicable and proper, but which, in the lapse of time, has become inapplicable and inexpedient, can be thereby amended, as in a legislative revision.

So far, the expediency of codification, or of legal abridgment, and classification, appears to be clear. And this operation may, it should seem, be effected, not only with advantage, but without great difficulty, in the statute law, and especially in the criminal law, so far as enacted by statute. With ordinary skill and accuracy, the language of the classified abridgment of the existing statutes, may be made, if not more, at least, equally, distinct, precise, and exclusive of ambiguous or doubtful construction, as the language of the statutes themselves. And, in the criminal department, penal enactments, applicable to offences, that have ceased to be committed, or which have been made, either too severe, from the impulse of the evil, felt at the moment, or too gentle and insufficient to prevent the evil, may be either abolished, or so modified, as to attain the object in view,

and to harmonize with the feelings of a more enlightened people.

Nay, not only may the statute law, with ordinary intelligence and ease be thus abridged and reduced in bulk, and rendered at least as clear in expression, as at present, it may also in both these respects, particularly the latter, be greatly improved by the application of a more scientific method of enactment, and the skilful adoption of language more appropriate, distinct and concise. And with reference to this country, as the statute law of Great Britain, even with the melioration it has recently undergone, is admitted on all hands to be still so defective and exceptionable in form and arrangement, in language and style, and so unworthy of a nation so enlightened in almost every other branch of art and science,* it seems manifest, that the improvements now commenced in this department of the law must be followed out and completed, before any successful attempt can be made to digest the common law into a code.

The conversion of the common law into classified, and abridged statute law, must be attended with much greater difficulty. It is clearly impossible, we have seen, by imbodying the common law, in a legislative form, to render it stationary for any considerable period of time, or to check its continued growth, through the monthly, or yearly, emergence of new cases for decision, while a nation continues to advance in prosperity, inter-

* "Without presuming to question the policy of the statute law in any of its branches, your committee cannot but observe the matter of it to be in many places discordant, in other cases obsolete, in others perplexed by its miscellaneous composition of incongruities; and that its style is for the most part verbose, tautologous and obscure."—*Report of Committee of Commons on Temporary and Expiring Laws:* 1796. *See also Parliamentary Papers relative to the drawing of Acts of Parliament:* 1838. Pp. 69—75.

nal and external, or until, from the operation of those laws, by which human affairs appear to be so far regulated, a nation retrogrades to ignorance, poverty, and barbarism.

It is also clear, that the conversion of the consuetudinary, or judicial into statute law, will leave it exposed, to all the risks of ambiguous, or doubtful, construction, to which the statute law is itself exposed, from the natural imperfection of language as the representative of thought, and from the imperfect use of language. And the chief means, if not of preventing, at least of diminishing, these risks, will be a strict adherence to the judicial phraseology, as having a fixed and generally recognised, if not technical meaning. "Verum," says Lord Bacon, "in hujusmodi legum regeneratione, atque structurâ novâ veterum legum atque librorum, legis verba, prorsus et textum retineto; licet per centones et portiones exiguas, eas excerpere, necesse fuerit; ea deinde ordine contexito. Etsi, enim, fortasse, commodius, atque etiam, si ad rectam rationem respicias, melius hoc transigi posset, per textum novum, quam per hujusmodi consarcinationem, tamen in legibus, non tam stylus et descriptio, quam auctoritas; et hujus patronus, antiquitas, spectanda est. Alias videri possit, hujusmodi opus scholasticum potius quiddam, et methodus, quam corpus legum imperantium."—*De Aug. Scient.* Lib. VIII. C. III. Aphor. 62.

In the impartial, and dispassionate, view of the subject, which we have thus endeavoured to take, we have arrived at the conclusion, that although not calculated to realize all the extravagant expectations of its admirers, or to secure the vast advantages they predict, codification, or the legislative arrangement of the private law, civil and criminal, of a nation, is likely, upon the whole, to be productive of good; the probable advantages, more than counterbalancing, the probable disadvantages.

In using the terms legislative arrangement, we mean, under legislative authority; for it is abundantly obvious, that popular representative legislatures, such as those of this country, of the United States of America, or of France, are by no means fitted for such a task. The work must obviously be intrusted, in the first instance, to a commission, or commissions, composed of a few of the ablest, and most experienced, and enlightened, lawyers, whom the country possesses; whose talents have been cultivated, and whose views have been enlarged, by practice, if not on the bench, at least at the bar. Even by such men, the task will be found an arduous one; and when completed, their work should, of course, be subjected to legislative revision.

In England, indeed, considerable progress, has already been made, in this great work. It is gratifying to reflect, how many amendments were some years ago introduced into the criminal law of that country, under the official encouragement, though not professional, direction, of Sir Robert Peel. For his long-continued exertions for the practical improvement of various departments of the law, Sir Samuel Romilly deserved the gratitude of his country. The still more extended, indefatigable, and energetic exertions of Lord Brougham, have already achieved much; and it is hoped will accomplish a still greater boon for the English nation. The various reports of the law commissions, appointed during the two late reigns, appear to be marked by their practical wisdom. And, at no very distant period, it may reasonably be expected, the private law, civil and criminal, of the British nation, will attain all the improvement, and possess all the beneficial qualities, which codification, or legislative classification, and sanction, are capable of realizing.

But in taking this favourable prospective view of the destinies of the private law of this, and other nations,

we must not deceive ourselves, by imagining, that codification any more, than other human schemes, and plans, is exclusively an instrument of good, or will accomplish, a perfect work, beyond which, nothing will remain to be desired.

At the present advanced period of civilization, the accumulated judicial experience of past ages, will, no doubt, enable the framer of a new code of private law, civil and penal, to embrace a large portion of the cases, which are likely to occur in future times. But, so far as we can judge, from past experience, it will by no means, enable them to foresee, and provide for all future cases. In the determination of such future cases, as are not embraced by the code, the existing tribunals must proceed on the same principles, as they have hitherto done, and the code itself will require a revision, perhaps every thirty, or forty years, in order to maintain its character of a complete digest of the existing law.

Again, in framing a code of private law, notwithstanding all the great judicial experience and wisdom, attained in this enlightened age, there is still great risk of error in definitions, and detailed provisions, and of a perpetuity being given to such errors, by the legislative enactment, such as to preclude the correction of such errors, upon discovery, as under the present mode of administering the common law.

Of all the codes of law, which have been compiled, in modern times, since the criminal code of the emperor Charles V., those accomplished under the sway of Napoleon, are unquestionably the most complete; and may, therefore, be taken as a fair specimen, in judging of the probable effects of codification. And as it might be deemed presumptuous, in any foreign lawyer, to pretend to point out defects in codes, stamped by the sanction of such high authority, we shall merely here

briefly recite the statements, and remarks, recently made, by two or three French lawyers of eminence.

"Soon afterwards," says M. Lerminier, "Bonaparte became master, and the work of a civil code was now, no longer to be delayed. It offered to the first consul, the precious opportunity of making, and manifesting, his choice, among the conquests and results of the Revolution, of showing officially, that, if he rejected, whatever was derived from republican principles, he wished, on the contrary, to retain and preserve whatever concerned civil equality and domestic liberty.—There was thus effected, under the powerful influence of a single man, one of the most curious transactions, which the history of law presents. Along with the new maxims of the Revolution, upon the principal points of private law, the state of persons, succession, &c., openly re-appeared the traditions of the ancient jurisprudence, and the doctrines of the Roman law. In whatever did not come in collision with the spirit of equality, and independence, the ancient law was re-produced, under the elegant and philosophic forms of modern codes; several treatises of Pothier, some parts of Domat, and of the ancient ordonnances were rapidly dissected; and, in this manner, our old habits and customs in our private relations, were respected; the experience of our ancestors was associated with our own conquests. It was a sort of compromise between history and philosophy.—Our fathers, who so rapidly erected the codes between the tribunes of the convention, and the imperial throne, and who, by their energetic promptitude, obeyed wonderfully their political vocation, were neither speculative philosophers, nor profound historians; hence the defects of their works. The *Code Civil* is full of mistakes, in the matter of history; the *Code de Procédure* is an elegant revival of the *Pratiques du Chatelet.* Our

criminal procedure calls for reform, especially in the correctional jurisdiction. And the penal code presents a striking anarchy of the most contrary principles. The *Code Civil*, however, notwithstanding its imperfections, is very superior to the other four; it inherits the riches of the ancient French law, the wisdom of our old customs, the labours of Dumoulin, of Cujat, of D'Aguesseau, and of Pothier."

Again, in his late excellent work, entitled "*Traité de la Propriété*," Tom. II. Chap. 48, M. Charles Comte shows satisfactorily, that even in so important a matter, as the definition of property, the French legislators have fallen into error; that the definition of property in the *Code Civil* is inexact, may be applied to quite another thing, than the object defined, and that the most despotic governments might adopt it, without subjecting it to any modification, and without dread of its making them experience any constraint. And he takes the opportunity of offering this very sage advice; "Definitions given by the legislative power, may be useful, when they contain a command, or a prohibition, or when their object is to determine acts, which individuals are bound to perform, or to abstain from; but when they have no other object, than to make known the nature of things, they are useless, and dangerous, and should be left to science. In the doctrines of fact, a legislator has no more authority, than a simple individual, unless we admit, as a principle, that he is infallible."

In another chapter, M. Comte points out the unscientific manner, in which the compilers of the *Code Civil*, have unfolded the legal doctrines of property, particularly with reference to what is called the right of accession. "This is not the place to inquire," says he, "what is the right of accession, nor why accession produces a right; the researches into which we might

enter, in this respect, would have no other result, than to show, that it is a word imagined by men, who had not known, how to observe the nature of property, and to mark its limits."

But, judging from past experience, not only must we not expect absolute perfection, in new codes, either in accuracy of definition, or in scientific arrangement, and logical deduction of conclusions from premises; we must, it is feared, also admit, there is some risk, of these legislative codes, when established, cramping the operation of the scientific principles of the common law; of the rules sanctioned by them in perpetuity, proving in time the reverse of equitable, or generally inexpedient in their application; and of their preventing, or retarding, the adoption of other rules, more consistent with the public welfare. We have already seen, how consuetudinary and judicial law, advances with the improvement of a people. And for the most part, we find more extensive, and enlightened, views, in the common law, than in the statute law, of nations. It would not be difficult, to point out instances, in which the acts even of the comparatively enlightened Parliament of Great Britain, have injured the natural growth of the common law of England. But, as more in point, we shall take an illustration of the consequences, we are now contemplating, as to be apprehended from codification, from its actual operation in one, or two instances, pointed out by M. Frémery, another eminent French lawyer.

The compilers of the celebrated *Ordonnance de la Marine* of Louis XIV., promulgated in 1681, collecting the precepts of maritime and commercial experience, carefully established the principle, that the nature of the contract of marine insurance, consisted in its being solely an exact indemnity; beyond which it would be a wager. But, unfortunately, the Ordonnance did not

stop, with the announcement of the principle; it specified cases, and by article 15th, prohibited the insurance of freight, and of expected profits on merchandise. Adopting, as it generally did, the same rule, the *Code de Commerce* of Napoleon, has, by art. 347, declared all such insurances null and void. But, in establishing legislatively such prohibitions, and nullities, the code has obviously gone farther, than was necessary, for maintaining the *bona fides* of marine insurance, as a contract of indemnity. Accordingly, it appears, that in France this regulation is almost daily evaded; that merchants feel the necessity of insuring the expected result of their adventures; that this is accomplished by a policy of honour; and that, from the good faith, which is the soul of commerce, this contract is as punctually executed, as if the law had authorized it. And the consequence is, that, under this policy of honour, the evil which the legislative nullity was intended to prevent, frequently takes place, from the want of those judicious restrictions, which, in the prohibited cases, would give effect to the contract, only so far as there is a real insurable interest. On the contrary, in other maritime countries, where no such imperative legislative rules have been established, the contract of insurance has been construed, and given effect to, according to its real nature, as a contract of indemnity. The distinction has been marked, in the gradual development of the common law, between the insurance of a determinate profit, and the insurance of the value of the goods on their arrival at the port of destination. The latter is quite consistent, with the nature of the contract, as affording merely an indemnity. The contract is lawful, as often as the insurance is conformable to the real result. Such has been the judicial exposition of the law of insurance, not only in England, but also among most of the other maritime states, as appears

from the excellent work of M. Benecke, the Hamburgh merchant, who has deduced his system of insurance, not only from the laws and usages of the principal trading nations of Europe, but also from the nature of the subject,—*aus der Natur des Gegenstandes entwickelt.*

Again, the French *Code de Commerce,* art. 369, conformably to the *Ordonnance de la Marine* of 1681, art. 46, declares, that abandonment may take place in case of hostile capture. And agreeably to this legislative rule, the French courts appear to have subjected the underwriters, as for a total loss, in all cases of capture, however soon afterwards, a re-capture may have occurred. But, by the law of England, as unfolded judicially, the underwriter, in the event of speedy re-capture, is subjected only, as for a partial loss, upon the true principle of a contract of indemnity.

In short, codification, or general legislative enactment, while it apparently, and ostensibly, renders the law more palpable and certain, and limits more distinctly the discretion of the judge, yet, by its very fixed and unchangeable nature, precludes, in a certain measure, that gradual adaptation to circumstances, and gradual improvement of the law, which would otherwise naturally take place, from the great increase in the multifarious connexions and transactions of individuals, consequent upon the extension of trade and manufactures among a prosperous people.

The principles of the science of private law, we have formerly seen, rest upon the constitution of mankind, as congregated in communities, and the external circumstances, in which they are placed;—a more stable basis, than the opinion or fiat, of any human legislator. The science grows, and is extended, and enlarged, in proportion as facts are multiplied, and collected, in the course of the gradual development of human industry

and of human transactions, not merely by accumulating decisions pronounced under the control and direction of an invariable text. This latter part of jurisprudence is, no doubt, useful. It is necessary for the establishment of sound maxims of interpretation, and of logical deduction; but it is by no means the noblest part of the science. That nobler part has its source and foundation in nature itself.* And to prevent its natural progress, and advancement, from being impeded by the fixed character of codification, it may be necessary, that, while the legislature sanctions imperatively, those rules of the common law, which have been found from experience, most just and equitable, and most generally expedient, the tribunals should also be instructed, to extend their views, in point of justice and expediency, to the new and varied connexions, which arise from changes of circumstances, and from a greatly increased development in the reciprocal relations of men; and to report, at stated intervals, the result of their farther observation and experience, that the improvements suggested may, from time to time, be adopted by the legislature.

Finally, judging from what has taken place, after the promulgation of the different legislative codes of modern times, and particularly since the promulgation of the codes of Napoleon, we cannot entertain any reasonable expectation, that positive law will be thereby rendered so simple, and complete, and, at the same time, so reduced in bulk, as to dispense with all other legal compositions, except the codes themselves; or that such codes will, in future, supersede all necessity, or demand, for, or will prevent the composition of, com-

* See the profound article by M. A. Frémery, Avocat de la Cour Royale. Themis VIII. p. 217.

mentaries, or separate treatises by private individuals, expository, or illustrative of the law.

Soon after the different French codes were promulgated, the occasion for works on the interpretation of these codes, appears to have been strongly felt; and the demand appears to have been speedily supplied. On the *Code Civil*, there arose a crowd of commentators, of whom we shall only notice, the two most distinguished, M. Toullier, and M. Merlin, whose writings, it has been observed, by eminent French lawyers, will endure, as long, as the legislation itself, which gave them birth. In noticing the great work of the former, entitled *Le Droit Civil François suivant l' ordre du Code, ou l'on a tâché, de reunir la théorie, et la pratique*, and which, in 1837, had reached a fifth edition, and extended to fifteen octavo volumes, the late excellent M. Jourdan, remarked, "encouraged by his brilliant success, M. Toullier every day redoubles his efforts; his plan enlarges itself more and more; comparison with foreign legislation and with the Roman law—historical and philosophical origins—comparison of the private, with the public law—critique of defective laws—analysis of judicial determinations, (jurisprudence,) and of doctrine. The author has neglected nothing, to present the science of law, in its relations with the other sciences; and, the first of all the interpreters of the code, has opened, and pointed out, the true route, which jurisconsults ought to pursue in future, in order to make their labours harmonize with the wants of the nineteenth century." Themis VI. 339. The work of M. Merlin, the other distinguished commentator on the *Code Civil*, entitled, *Repertoire universel raisonné de Jurisprudence*, had in 1828, reached a fifth edition, and with its supplements extended to eighteen quarto volumes. And M. Jourdan represents it, as exhibiting all the

variations of judicial law, from the publication of the *Code Civil*, and as a book, the most rich in facts and materials, which can be found, for arriving at the solution of many of the great problems, in juridical organization. Themis VI. 441.

Nor have the commentaries been confined to the *Code Civil;* there are at least two distinguished commentaries on the *Code de Commerce.* M. Pardessus published the first edition of his excellent *Cours de Droit Commercial* in 1816, and a second edition in 1821, in five volumes. And in 1822, and 1823, M. Boulay-Paty published in four volumes, his learned *Cours de Droit Commercial Maritime, d'aprés les Principes et suivant l'ordre du Code de Commerce.*

To all appearance, then, codification, though carried into effect, as far as practicable, will neither supersede as unnecessary, nor prevent future commentaries, and treatises by individuals on the private law of a nation. Nor, perhaps, is this to be regretted, as the legislature and the judicial tribunals, may frequently derive valuable suggestions from such exercise of individual talent. And, with all due deference, it might, perhaps, be of public advantage, if, as among the continental nations, professorships were established, particularly in the southern parts of this island, to a greater extent, than hitherto accomplished, for the instruction of youth in private law, not only as the positive law of the land, with a view to professional practice, but also as a science, and with a view to the gradual improvement of the positive law. It is also much to be desired, that those eminent and accomplished English lawyers, who have not only fathomed the depths of their own national, perhaps rather artificial and complicated, system of law and equity, but entertain enlightened and profound views of law generally, as a science, could find leisure, more frequently

to give to the public, the result of their studies, experience, and reflection; so that all pretext might thus be, in time, removed for the charge, so frequently, but groundlessly, urged by continental jurists against English lawyers generally, "*La Loi n'est pour eux, qu' une Profession.*"

GLASGOW:—EDWARD KHULL, PRINTER TO THE UNIVERSITY.

CORRIGENDA.

Page 19, Note, line 4,—*For* Heineccius Elem. Jur. Natur. L. II. C. iii. § 62, *read* L. I. C. iii. § 62.
— 23, line 15,—*For* De Jure Naturæ et Gentium secundum Disciplinam Hebræorum, *read* De Jure Naturali et Gentium juxta Disciplinam Ebræorum.
— 25, — 26,—*For* extensibly, *read* ostensibly.
— 27, — 7, 8,—*For* vitando, *read* vetando.
16, 17,—*For* immortalis, *read* immutabilis.
— 28, — 28,—*For* Amaelfi, *read* Amalfi.
— 30, — 6,—*For* Illustris Contravers. Juris. *read* Illustr. Controvers. Juris.
— 31, — 34,—*For* De principia Juris, *read* De principio Juris.
— 32, — 21,—*For* Bartamaqui, *read* Burlamaqui.
— 34, — 12,—*For* cinque, *read* cuique.
— 34, last line, *insert* a.
— 37, — 10,—*For* Theoromuta, *read* Theoremata.
— 39, — 9,—*For* diuternam, *read* diuturnam.
— 40, — 2,—*For* dictamen, *read* dictatum.
— 48, — 6,—*For* Anfungs gründe der Rechts Lehre, *read* Anfangsgründe der Rechtslehre.
17,—*For* D'Alembert's, read D'Alembert.
31,—*For* Emerigan, *read* Emerigon.
— 52, — 14,—*For* Juristichen, *read* Juristischen.
— 64, Note * *For* 14, *read* page 47.
— 68, Note * *For* c. 4. § 9, and c. 5, § 1, 4, and c. 7, *read* cap. 4, 5, 6, 7.
— 112, — 33,—*For* en, *read* on.
— 121, — 2,—*For* frequent, *read* frequently.
— 136, — 1,—*For* de, *read* des.
3,—*For* Judiciæres, *read* Judiciaires.
— 142, — 34,—*For* founding, *read* sounding.
— 144, — 13,—*dele* be.